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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PETER BOYLAN,
JOHN E. CAREY,
THOMAS J. CONNOLLY,
MATTHEW A. KILROE,
JOHN F. MCCORMICK,
KENNETH J. NAVE,
AND
FRANCIS X. SHEEHAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1.

Where an indictment charges seven police officers with RICO conspiracy and racketeering (Counts One and Two) in conducting the affairs of the local police department through a pattern of multiple Racketeering Acts of federal extortion, or, alternate state bribery offenses and also includes Racketeering Acts involving a different and separate mail fraud scheme participated in by only two of the defendants, and the extortion and mail fraud Acts are replicated as substantive counts; is it not anomalous and error, as well, for the Circuit Court to rule that there was no misjoinder of the mail fraud scheme, but that, however, a variance existed regarding the charge and the proof of the mail fraud scheme within the framework of the RICO conspiracy, inasmuch as the court's analysis led it to incorrectly conclude that joinder was proper and thus caused the court in its prejudice calculus to apply a standard that did not fully encompass the test enunciated in *United States v. Lane*, 474 U.S. 438 (1986).

2.

In a federal trial on a multi-count indictment in which various types of Hobbs Act extortion offenses are predominant, are not the district court's instructions constitutionally inadequate, if the jury is to determine the intent element of the Hobbs Act offenses solely from the court's definition of "willfully" and "knowingly" that were given in the beginning of the court's charges and no instruction on the *mens rea* element is given when the Hobbs Act offenses were later explained to the jury.

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

The petitioners, Peter Boylan, John E. Carey, Thomas J. Connolly, Matthew A. Kilroe, John F. McCormick, Kenneth J. Nave and Francis X. Sheehan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 14, 1990, affirming the judgment of the United States District Court for the District of Massachusetts, Criminal Case, *United States v Boylan, et al.*, Crim. A. No. 87-342-MA.

COURT OPINIONS IN THIS CASE

In response to the defendants' post-trial motion for a new trial and evidentiary hearing based on the assertion of one of the defendant's attorneys that a juror had reported to him that jury misconduct had occurred in the case, the court interviewed the juror in the presence of the government and the defense, and thereafter similarly interviewed every juror and alternate. As a result of these proceedings, the court issued a written opinion. *United States v. Boylan*, 698 F. Supp. 376 (D. Mass. 1988).

In the appeal of the seven defendants to the United States Court of Appeals for the First Circuit, from their district court convictions, the Court of Appeals delivered a written opinion affirming the district court judgment. *United States v. Boylan*, 898 F. 2d 230 (1st Cir. 1990)

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit for which review is here sought by writ of certiorari was entered and filed on March 14, 1990.

On June 6, 1990 Justice Brennan entered an order in this case extending the time in which to file this petition for writ of certiorari from June 12, 1990 to July 12, 1990.

Jurisdiction to review the said judgment of the First Circuit, United States Court of Appeals, by writ of certiorari is conferred on this Court by the provisions of Title 28, United States Code, Section 1254(1) and Rule 13.1 of the Rules of this Court.

STATUTORY PROVISIONS

The statutory provisions, regulations and rules are set out in the Appendix hereto.

STATEMENT OF THE CASE

1. Nature Of The Case And Proceedings Below

A fifty-eight count, 129 page, indictment was returned in the United States District Court for the District of Massachusetts, against the petitioners, seven members (detectives) of the Boston Police Department. The case was assigned to District Judge Mazzone. Each defendant pleaded not guilty and demanded a jury trial. After a lengthy trial, the jury returned general verdicts of guilty against the defendants on all except two of the counts. Thereafter, the defendants were sentenced, each to a prison term. An appeal by the defendants to the United States Court of Appeals for the First Circuit followed. In a written opinion, dated March 14, 1990, the Circuit Court affirmed the judgment of the District Court.

2. Statement Of Facts Material To The Questions Presented

A. The Indictment

(1) Count One (RICO Conspiracy)

In Count One the seven defendants were charged with a RICO conspiracy offense (18 U.S.C. Section 1962(d)), under

the theory that from "on or about October 1975 through August of 1986", as employees of the Boston Police Department, they unlawfully conspired to conduct the affairs of the Department — an "Enterprise" within the meaning of 18 U.S.C. Section 1961(4) — through a pattern of racketeering activity. (Paras. 1-7)

Count One alleged that the principal purpose of the conspiracy was that the defendants and their co-conspirators used their positions as detectives to obtain money and other things of value from individuals who owned and operated licensed and unlicensed businesses selling alcoholic beverages in the City of Boston, in return for: 1) protecting them from enforcement of the laws and regulations governing them and for providing special police services to them; 2) ignoring and violating their duty to enforce the law and regulations. (Paras. 8-12, 14, 15) Thirteen such individual owners and operators of businesses were identified. (Para. 13)

Count One further charged that as a part of the conspiracy "certain of the defendants and their co-conspirators" defrauded other members of the Boston Police Department and the owners and operators of businesses by conducting private detail services not authorized by the Police Department and in receiving payments for details not performed. (Paras. 16-17)¹ Additionally, it was alleged that it was a further part of the conspiracy that "certain of the defendants and their co-conspirators" through the use of the mails, defrauded the United States of lawfully owed income tax revenues. (Para. 18)²

¹ As the further allegations of the indictment, Racketeering Acts J1-18 and Counts 40-57, made clear, Sheehan and Nave were the only defendants allegedly involved in the conduct referred to in Paras. 16-17.

² The averments of Count 58 established that only the defendants Sheehan and Nave were allegedly involved in the conduct referred to in Para. 18.

(2) The "Racketeering Acts" Under the RICO Conspiracy Count

The pattern of racketeering activity through which it was alleged the defendants agreed to conduct and participate in the conduct of the affairs of the Enterprise was set out in Para. 19. Generally, these were alleged as multiple acts involving: 1) extortion through the wrongful use of fear of economic harm and under color of official right, attempt and conspiracy to commit extortion, in violation of 18 U.S.C. Secs. 1951 & 2; 2) the solicitation and receipt of illegal gratuities and bribes, in violation of Massachusetts General Laws Ch. 268A, Secs. 2 & 3, and Massachusetts Common Law; and 3) use of the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. Secs. 1341 & 2.

The specific "Racketeering Acts" were grouped under alphabetical headings A through J with the Acts in each group numbered. The alphabetical groupings were made according to the alleged victim(s) and the defendant(s) who were involved.³

In Section A, the Racketeering Acts were alleged against the defendants Connolly and Sheehan and involved Norman A. Chaletzky and Richard Duca, joint owners of several businesses licensed to sell alcoholic beverages. There were 15 such Acts, each (except one) alleging, alternatively, an extortion offense in violation of 18 U.S.C. Section 1951; and a bribery offense in violation of Mass. Gen'l Laws, Chapter 268A Section 2. Allegedly, the Acts began in December of 1979 and occurred each summer and each December thereafter to the year 1986. Racketeering Act A-11 related to Connolly alone and concerned his receipt of \$100 from Chaletzky in June of 1984, alleged as a gratuity under state law.

³ Racketeering Act E was removed from jury consideration by judgment of acquittal at the close of the government's case. Tr. Vol. 38, p. 90. Racketeering Act G was stricken from the indictment on motion of the government before trial.

There were nine Racketeering Acts under Section B, subdivided into alternative allegations of extortion under 18 U.S.C. Section 1951 and of bribery under Massachusetts General Laws, Ch. 268A, Section 2. Defendants Boylan, Carey, Kilroe, McCormick and Nave were named in this group of Racketeering Acts, which involved Joseph McGowan, part owner and manager of 1270 Boylston, Inc. Act B-1 alleged a conspiracy between the defendants, which, alternatively, asserted an extortion conspiracy in violation of 18 U.S.C. Sec. 1951 and a bribery conspiracy in violation of Massachusetts common law. The remaining Acts alleged in this section were further subdivided in alternative charges of federal extortion and state law bribery. These Acts were set in the period from December 1982 to April 1986. Not all of the several defendants in this group were named in each of the Acts in this section.

The Racketeering Acts under Section C related to the defendant Matthew Kilroe only and involved the bars under the ownership of Seattle, Inc., and Kimhill Corp. (Thomas Moloney). There were seven Acts under this section dated from December of 1979 to January of 1986, which were divided into an "a" and "b" part that alternatively, alleged that the particular Act constituted extortion under 18 U.S.C. Section 1951 (the "a" part), or bribery under Massachusetts General Laws, Ch. 268A, Section 2 (the "b" part). The first Act, C-1, alleged a conspiracy under the federal extortion law and, alternatively, under Massachusetts common law between Kilroe and other unspecified co-conspirators.

Racketeering Act D concerned only a single situation involving the defendant Kilroe. It was alleged that in December of 1984, Kilroe obtained \$200 from Warren H. Frank, of the Kimhill Corp., which constituted either federal extortion (D-a), or a bribe under Massachusetts laws (D-b).

The Racketeering Acts under Section F, were six allegations (F-1 through F-6) against the defendants Nave, Sheehan and Kilroe. These Acts involved George and Lawrence E.

Blacke of 7-9 Landsdowne Corp. Again, in each Act there were alternative allegations of federal extortion (part "a") and state bribery (part "b"). Act F-1 alleged a conspiracy between Nave, Sheehan and other unnamed persons, which was alleged, alternatively, under the federal extortion statute and the Massachusetts common law.

In Racketeering Act H, it was alleged that from about 1975 through about August 1986, Connolly received money, interest free loans and complimentary meals and beverages (gratuities) from Cafe Budapest, Inc. (owned and operated by Edith Ban) in violation of Mass. Gen'l Laws Ch. 268A, Section 3.

The I group of Acts related to the victim Avents Entertainment Corp. and That's Entertainment, Inc., t/b/a/ Metro and Spit (hereafter Metro/Spit). Six acts were charged in this group. Act I-1 was in two parts. It was first alleged (I-1a) that from in or before 1980 through about August 1986, Connolly and the defendants Peter Boylan, Kenneth Nave, Francis X. Sheehan and others unnamed, conspired to extort money from Metro/Spit. In I-1b, the conspiracy was alleged to violate Massachusetts Gen'l Laws Ch. 268A, Section 2. Act I-2 made alternative allegations of federal extortion and state bribery against Boylan and Nave concerning a December 1982 event. Act I-3 consisted of two parts ("a" and "b") which made alternative allegations against the defendants Boylan, Connolly, Nave and Sheehan concerning a December 1983 event, first (a), that the defendants extorted money from Metro/Spit; and in the (b) part, that they accepted the money as a bribe in violation of Massachusetts law. Act I-4 was similarly structured and charged the same four defendants. Again, the victim was Metro/Spit, the date was December 1984. Act I-5 was cast in the same form as I-3 and I-4, charging the same four defendants with acts arising from the receipt of money in December of 1985 from Metro/Spit. Act I-6 involved only the defendant Sheehan, charging him in the same alternative fashion about an occurrence in the summer of 1986.

The Racketeering Acts under Section J (J-1 through J-18) were allegations against the defendants Nave and Sheehan only. These Acts involved the perpetration of an alleged mail fraud scheme involving United Liquors, the owner of a billboard overlooking Fenway Park. It was charged that Sheehan agreed to provide a security detail to keep spectators off the sign during the home games of the Boston Red Sox baseball team; and that he periodically gave United Liquors the names of various police officers who had purportedly performed the details (but who had not, in fact, done so). United Liquors sent Sheehan checks payable to these officers as compensation for the details. Sheehan and Nave allegedly cashed the checks by forging the signatures of the payees. Allegedly, the scheme defrauded other members of the Police Department of money by conducting private, unauthorized detail services, and defrauded United Liquors of money by receiving payments for details not performed.

Paragraph 20 of Count One ("The Pattern of Racketeering Activity") asserted that each of the defendants participated in the conduct of the affairs of the Enterprise through a pattern of racketeering activity; and, next, sub-paragraphs (a) to (g) enumerated the activity as to each of them by a summary of the Racketeering Acts in para. 19.

Paragraph 21 of Count One listed the overt acts allegedly committed in furtherance of the racketeering conspiracy.

(3) Count Two (RICO Substantive Offense)

Count 2 charged the seven defendants with the substantive offense of racketeering under 18 U.S.C. Section 1962(c). It was alleged that, being employed by and associated with the Enterprise, they conducted its affairs through a pattern of racketeering, consisting of multiple acts of receiving illegal gratuities and bribes, in violation of Massachusetts laws, mail fraud in violation of 18 U.S.C. Section 1341 & 2, and extortion in violation of both 18 U.S.C. Section 1951 & 2, being those acts described in paras. 19 and 20 of Count One.

(4) The Remaining Counts

The remaining 56 counts charged the defendants singly, or various groups of them, with conspiracy or substantive violations of the federal offenses that were alleged as racketeering acts under Count One that were within the range of the statute of limitations. Counts 3 through 39 were charged under the Hobbs Act, 18 U.S.C. Section 1951. Counts 40 through 57 were brought against the defendants Sheehan and Nave only and related to the alleged mail fraud scheme in which the two allegedly participated. Count 58 charged the defendants Sheehan and Nave only, with a violation of 18 U.S.C. Section 371, conspiracy to evade the payment of federal taxes on the income derived from the mail fraud scheme set out in Counts 40 through 57.

B. The Response Of The Courts Below To The Petitioners' Challenge To The Joinder Of The Mail Fraud Charges And To The Variance Claimed To Have Been Created By Proof Of the Mail Fraud Scheme.

In the District court the defendants insisted through motions filed under Rule 8(b), Fed.R.Crim.P., that the face of the indictment made it clear they were misjoined and should not be tried together. Of particular focus was the claim that the differences between the "acts and transactions" constituting the Mail Fraud scheme set forth in the Series J Racketeering Acts and in Counts Forty through Fifty-Eight and the extortion/bribery offenses in Series A through I and in Counts Three through Thirty-Nine failed to meet Rule 8(b)'s standard of sameness. Again, largely on the basis of the substantial dissimilarities in the mail fraud scheme and the extortion offenses, it was asserted that proof of the mail fraud scheme created a prejudicial variance regarding the single RICO conspiracy that was charged. The District Court ignored the defendants' misjoinder and variance claims; and as to their

arguments about the evidence having shown multiple RICO conspiracies, the court gave the jury an instruction.⁴

In the Circuit Court, the petitioners argued, *inter alia*, that: 1) the evidence established multiple conspiracies, rather than the single conspiracy alleged by Count One and this variance affected their substantive rights⁵; 2) they were misjoined under Rule 8(b), the joinder was prejudicial and Rule 14 severance should have been granted.⁶

The Court addressed these arguments, taking joinder first, severance next, and then variance, reaching the result that the joinder of offenses in the indictment, including the mail fraud scheme, was proper under Rule 8(b)⁷, that Rule 14 severance was not warranted⁸; but, that there was a variance, in that "the UL crimes constituted a separate conspiracy and that the evidence did not allow a finding that they were in the master conspiracy's scope."⁹ Finally, the court concluded,

⁴ The district court disapproved each of the multiple conspiracy instructions submitted by the two sides (Defendant's Requests, p. 13; Government's Request No. 34, p. 49). Instead, the court instructed the jury: "Should you find that any defendant participated in a conspiracy that was different from those charged in the indictment, that determination would be no basis for finding the defendant guilty of any of the offenses charged." 47 Tr. 34.

⁵ *United States v. Boylan, et al.*, Nos. 88-2214-19, In the United States Court of Appeals for the First Circuit, Consolidated Brief for Appellants, Argument I.B. 2, 3, at pp. 28-35. A separate argument was made that: "The district court's multiple conspiracy instruction [see, n. 4, *supra*] was inadequate." *Id.* Argument I.B.1., at pp. 24-28.

⁶ *Id.* Argument II, at pp. 35-39.

⁷ 898 F. 2d at 245.

⁸ *Id.* at 246.

⁹ *Id.* at 247. In the Court's written opinion the mail fraud scheme alleged in the Series J Racketeering Acts and Counts 40-58 was variously referred to as "the UL crimes", "the UL plot", "the UL affair", or "the UL scheme", the UL being coined as a sobriquet for United Liquors, the victim company.

“that the variance did not impact any defendant’s substantial rights and, thus, can be dismissed as harmless.”¹⁰

C. The District Court Jury Instructions: The Element Of Intent In The Charged Hobbs Act Offenses

The multitude of extortion offenses charged in the indictment, as “Acts of Racketeering” under the RICO counts, and replicated as separate substantive counts, were all laid under the Hobbs Act, 18 U.S.C. Section 1951. The Hobbs Act allegations were variously for: conspiracy to commit extortion or, substantive extortion violations. The Hobbs Act accusations were cast in the terms that the property of the victim was obtained with his consent induced by the wrongful use of fear of economic harm and/or under color of official right.

Among the group of requested instructions tendered to the court by the government was *Request No. 14*, defining “willfully” and “knowingly”. The court gave this instruction at the outset of its charge to the jury, as a part of the instruction on the general law principles, saying:

“I define the terms ‘willfully’ and ‘knowingly’ for you, and because I use them again in these instructions as I read the statutes to you, I will define them again.

The term ‘knowingly’ means that the act was done voluntarily and intentionally, not because of mistake of accident.

The term ‘willfully’ means that the act was committed voluntarily and purposely with the specific intent to doing something the law forbids; that is to

¹⁰ Id. at pp. 247–48 (footnote omitted). In an earlier portion of its opinion, the Circuit Court announced that it was “unpersuaded” by the petitioner’s challenge to the district court’s multiple conspiracy instruction (*supra*, ns. 4, 5) Id. at p. 243, and gave its reasons for rejecting the challenge. Id. at pp. 243–44.

say, with bad purpose either to disobey or to disregard the law.

These definitions will apply to these terms throughout the remainder of these instructions. (Tr. 47-4)"¹¹

These definitions of "willfully" and "knowingly" were not thereafter repeated to the jury, and more particularly, the definitions were not given in relation to, nor linked to, the various Hobbs Act offenses to which the definitions pertained.¹²

D. The Circuit Court Approved The Manner By Which The District Court Had Instructed The Jury On The Intent Element Of The Hobbs Act Offenses.

The Circuit Court reviewed the petitioners' claim that the district court's instructions on the specific intent element of the Hobbs Act offenses were inadequate. At the outset, the court accepted their argument that specific intent is an essential element of every type of extortion under the Hobbs Act. 898 F. 2d at 253. Turning to the claimed deficiencies in the district court's charge, the Court stated that, "the definitions [of willfully and knowingly] employed by the court below adequately conveyed the essence of the *mens rea* requirement for Hobbs Act extortion." *Id.* at 253. Moreover, the court found no error because, "the charge as a whole made it plain that the definitions applied across the board." *Id.*

¹¹ The trial transcripts were numbered serially. The reference here (and throughout) is to the number of the transcript, followed by the page on which the quoted material appears.

¹² Though the court assured the jury that when he read the statutes involved in the case to the jury, he would again define the terms "willfully" and "knowingly" (*supra*), the court failed to do so.

ARGUMENT I

The Finding That The UL Crimes Constituted A Variance Was A Determination That The Crimes Were Misjoined, Thereby Mandating A Prejudice Inquiry In Accordance With *United States v. Lane*, 474 U.S. 438 (1986)

A. Overview

This is a multi-defendant case where the joinder of defendants and offenses, which, initially appeared to have met formal requirements, was, nevertheless, shown by later events to have violated joinder principles. Federal Rules of Criminal Procedure, 8(b) sets the limits for joinder; and requires only that the defendants be “*alleged to have participated . . . in the same series of acts or transactions . . .*” (emphasis supplied). Ostensibly, that standard was met in the petitioners’ case regarding the indictment’s mail fraud allegations and charges. Nevertheless, the trial evidence established that joinder was not proper. On review of the petitioners’ conviction, the Circuit court determined that there was an error in the charging of the mail fraud crimes. The court defined the error as a variance — a “difference in proof”¹³ — and “dismissed [the error] as harmless.”¹⁴ This result was based on a prejudice analysis employed by the Court that was consistent with its perception of the nature of the error. This formulation was defective, to the petitioners harm, in that, the court failed: 1) to assess the error as “retroactive misjoinder”; and, 2) to apply the broader prejudice standard mandated in *United States v. Lane*, 474 U.S. 438 (1986).

B. The Circuit Court Faces The Joinder Issue

In their appeal, the petitioners argued that they were misjoined under Rule 8(b), in that, for, among other reasons, the Rule’s requirement of “sameness” did not exist between

¹³ *United States v. Boylan*, 898 F. 2d 230 at 248 (1st Cir. 1990).

¹⁴ *Id.*

the mail fraud allegations and charges¹⁵ and the Hobbs Act ones; and that the RICO conspiracy charge did not rectify the misjoinder. Additionally, they claimed to have been substantially prejudiced by the misjoinder.

The Circuit Court rejected the petitioner's misjoinder arguments.¹⁶ The Court's ratiocination was: 1) the usual test for Rule 8(b) joinder (is a rational basis in fact for joinder discernible from the face of the indictment) had been met in this case. 898 F. 2d at 245; 2) "the same considerations which authorize joinder militate in favor of overruling defendants' Rule 14 [severance] claim." *Id.* at 246.

In the discussion on joinder, the court spoke broadly about joinder being "proper where, as here, a single RICO count 'embrace[s] all of the acts and transaction upon which the other . . . counts [are] based.'" 898 F. 2d at 245, quoting, *United States v. Tashjian*, 660 F. 2d 829, 833 (1st Cir.), cert. denied, 454 U.S. 1102 (1981). The court adverted to "the general rule":

"So long as there is a responsible basis for the averments, charging an omnibus RICO conspiracy normally supplies the glue necessary to bond multiple defendants together in a single proceeding where all are accused of participating in the conspiracy." *Id.*

¹⁵ According to the District court "[t]he trial lasted forty-seven days. The evidence consisted of the testimony of seventy-two witnesses and over 300 exhibits. . . ." *United States v. Boylan*, 698 F. Supp. 376, 379 (D. Mass. 1988). The United Liquor allegations occupied the entire first full week of testimony. One introductory witness was called; thereafter, the government presented the testimony of twenty-eight witnesses to support the UL allegations; which related only to Sheehan and Nave. In all, the government presented more than three dozen witnesses concerning the UL scheme.

¹⁶ *United States v. Boylan*, 898 F. 2d 230, 244-46 (1st Cir. 1990).

This case, the court explained, fits the rule because: 1) each defendant was charged with substantive RICO violations, with joining the overall RICO conspiracy, and with personally committing several predicate acts; 2) the RICO charges embraced all the events upon which the other 56 counts were based; 3) there were ample reasons why the indictment was shaped this way, including similarities among the predicate acts, which suggested the existence of a joint criminal enterprise; 4) the apparent public benefit in a common trial; 5) the "sameness" between the racketeering acts and the corresponding counts warranted joinder; and, 6) the trial evidence was ample to convict all defendants of the omnibus conspiracy, which assured that joinder was not a result of prosecutorial bad faith but was founded on a reasonable, good faith basis in fact. *Id.*

After giving reasons for finding that the petitioners joinder arguments — including objections to the charging of Series J Racketeering Acts in the RICO conspiracy and the related mail fraud counts in the indictment — should be rejected, the court undertook to square the ruling with the court's later holding that a variance existed ("[t]he UL affair did not belong within the confines of the RICO conspiracy." *Id.* at 247.) Thus, at the end of the joinder discussion, the court offered this explanation:

"Even our admitted reservations about the UL counts, *see infra* Part V, weigh rather lightly in this balance. Decisions as to the propriety of joinder must be reviewed on the basis of what the prosecutor, exercising due diligence, knew (or sensibly believed) when the indictment was drawn. We think that, whatever conclusion a retrospective look may yield, the government, going into the case, had grounds for a reasonable anticipation that the UL scheme could be wedded to the other racketeering acts. Stringing the counts together was proper." *Id.* at 245

C. The Circuit Court's Variance Ruling

When the court reached the petitioners variance argument and focused on the part dealing with the UL scheme, it felt compelled to state "the obvious", i.e., the scheme "on its face, seemed a breed apart from the other racketeering allegations mentioned in the indictment" 898 F. 2d at 247. The court elaborated, emphasizing that the illegal activity involved in the UL crimes (defrauding a business by trick) was dissimilar in nature, kind, and method of operation to that involved in the Hobbs Act offenses. "The methodological differences", the court noted, "are important." *Id.* Moreover, it was noted that the target in the UL crimes was also dissimilar, a wholesaler and importer, which, unlike the bar/restaurant/nightclub victims in the extortion scheme, was not open to the paying public; and, was thus, "not subject to the sort of street level oversight and regulatory control that made the other businesses so vulnerable to corrupt enforcement and undeserved preferences." *Id.* Accordingly, "[p]reying upon UL required a different tact." *Id.* Continuing, the court observed:

"This uniqueness had another relevant aspect: unlike the bar/restaurant/nightclub schemes, which fed upon one another, it seems doubtful that the UL 'venture could have helped the [other] venture[s], or vice versa.' See *Glenn*, 828 F. 2d at 859. Then, too, the billboard caper was much more tightly circumscribed, known by far fewer defendants, and bereft of the interconnections so prevalent among the other series of racketeering acts. Only Nave and Sheehan were directly involved. There is precious little evidence to suggest that any of the other defendants approved of, joined, or shared Nave's and Sheehan's efforts to conduct BPD affairs through mail fraud. Put bluntly, too few of the common threads which ran through the fabric of the other racketeering acts ensnarled the UL affair." *Id.* (footnote omitted)

Even though the court determined that the inclusion of the UL crimes constituted a variance, the court also concluded that the variance did not affect the substantial rights of any of the petitioners. 898 F. 2d at 247–48. None of them were “significantly prejudiced”, the court said. *Id.* at 248. Nave and Sheehan were convicted of other non UL related RICO predicate acts, “so there [was] no chance that they were found guilty of the RICO conspiracy solely on the basis of their involvement with UL.” *Id.* At any rate, since Nave and Sheehan were acquitted of other counts (Nave, two and Sheehan, one), the court reasoned that “the jury showed its ability to discriminate between the individual defendants and among the charged offenses, thus blunting any accusation of harmful spillover.” *Id.*

The court found the other petitioners’ protest of prejudice, based upon the district court’s admission of the UL evidence without limitation “more troubling,” *Id.*; but, nonetheless “vapid.” *Id.* The principle reason was that by comparison, the UL affair was less reprehensible than the extortion schemes and thus not likely “realistically, to add much fuel to so torrid a fire”, *Id.*, as engendered by the extortionate crimes.

The court concluded its remarks on the subject by saying:

“The sockdolager is that the trial court’s instructions provided ample prophylaxis. Notwithstanding the number of defendants, the evidence was presented in a well structured, compartmentalized fashion that minimized the risk of spillover to particular defendants from evidence directed at others. At every turn, the trial judge reminded the jury to treat each defendant and each charge separately. In these ways, the chance for harm — remote and speculative to begin with — was further reduced. The court’s precautions supply considerable assurance that no unfair prejudice resulted from the variance. We see no basis for ordering a new trial.” *Id.* (footnote omitted)

D. Variance: Indistinguishable From Misjoinder

The court's finding that evidence of the Series J crimes constituted a variance bespeaks the misjoinder of those crimes, as predicate acts of RICO racketeering, as subsumed in the RICO conspiracy, and as substantive offenses.

The court's comment in *Kotteakos v. United States* 328 U.S. 750 (1946), that the problem of variance is not only one between indictment and proof, but is also essentially one of joinder, 328 U.S. at 774, is manifest here.¹⁷ The characteristics of misjoinder and variance are indistinguishable as to the mail fraud allegations and charges in this case.

The Circuit Court found that a variance existed, in that, "the UL crimes constituted a separate conspiracy and that the evidence did not allow a finding that they were in the master conspiracy's scope." 898 F. 2d at 247. Later, the court restated this conclusion: "The UL affair did not belong within the confines of the omnibus RICO conspiracy. To this extent, a variance existed." *Id.* The sum of these holdings means that the UL allegations and charges should not have been included in the indictment. If they were not "in the master conspiracy's scope", or, as otherwise stated by the court, "did not belong within the confines of the omnibus RICO conspiracy," then, similarly they did not, and could not, constitute part of a "series of acts of transactions constituting an offense" within the meaning of Rule 8(b). Thus, the court's variance decision implicates principles of misjoinder.

The Court's reliance on justifications for the joinder of the UL crimes blinded it to the possibility of "retroactive misjoinder." The Court persisted in the view that since joinder of the UL crimes was proper, based on the allegation of the indictment and the encompassing nature of the RICO charges,

¹⁷ See also, *United States v. Varelli*, 407 F. 2d 735, 744 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972); *United States v. Sutherland*, 656 F. 2d 1181, 1190, n.6 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982); *United States v. Manzella*, 782 F. 2d 533, 539 (5th Cir. 1986)

no misjoinder had occurred. 898 F. 2d at 245. The court, however, failed to appreciate that its variance finding was in effect a finding of initial misjoinder.¹⁸ In *United States v. Varelli*, supra, the court, applying *Kotteakos*, reversed the appellants' convictions because of variance (the evidence established multiple conspiracies rather than the single one charged). The court referred to a central part of the holding in *Kotteakos*, making the point that the petitioners emphasize here, namely, that the variance finding in *Kotteakos*, (as in this case), was based on the failure of the government to prove that there was one overall conspiracy, and stemmed from the individual and separate nature of the offending included scheme(s).

Proof at the trial that a conspiracy or scheme constitutes a variance from the overall scheme that is charged, as was the situation in *Kotteakos* and *Varelli*, implicates a markedly different misjoinder analysis from that which controls cases like *Schaffer v. United States*, 362 U.S. 515 (1960), where the conspiracy count (which links several defendants and substantive counts) falls for insufficiency. The initial joinder in *Schaffer* was permissible under Rule 8(b), Fed.R.Cr.P.; the remaining substantive charges were violations of the same statute, drawn in nearly identical language, committed during the same period and in the same manner ("thus ma[king] proof of the overall operation of the scheme competent to all counts" Id. at 514-15); the proof was related to each defendant separately; the jury was painstakingly instructed to that effect and the charge repeated those instructions ("In short, the proof was carefully compartmentalized as to each petitioner" Id. at 515). Under the facts in *Schaffer*, the court found that the continuation of the trial after the conspiracy count was dismissed, was

¹⁸ In *Lane*, supra, the Court commented about the variance holding in *Kotteakos*: "Although the Court's review in that case was from the perspective of a variance from the indictment, rather than misjoinder, the court recognized that misjoinder was implicated, and suggested that the harmless error rule could similarly apply in that context." 474 U.S. at 447 (footnote omitted).

controlled by the prejudice standard of Fed.R.Cr.P. Rule 14, and that no prejudice was shown.

The court in *Schaffer* found *Kotteakos* "inapposite", saying: "That case turned on the harmless-error rule, and its application to a serious variance between the indictment and the proof. Thus, the court found 'it highly probable that the error had substantial and injurious effect'" 362 U.S. at 516-17. Accord: *Brandon v. United States*, 431 F. 2d 1381, 1395-96 (7th Cir. 1970), cert. denied, 401 U.S. 942 (1972).

In *Kotteakos*, the variance was that the "proof made out a case, not of a single conspiracy, but of several, notwithstanding, only one was charged in the indictment." 328 U.S. at 755. The same situation existed in the instant case, except that instead of "'at least eight and perhaps more separate and independent groups'"¹⁹, there was only one such group here. The difference in numbers, possibly important in terms of the magnitude of prejudice, does not alter the fact of error. In the present case, the showing of variance simply verified an error that was present in the facial assertions of the indictment. The charging of Sheehan's and Nave's mail fraud crimes as predicate RICO acts on the theory of the crimes were intended to further the enterprise's affairs, was an improper legal interpretation.²⁰

¹⁹ Id. at 754 (quoting the Circuit Court, 151 F. 2d at 152).

²⁰ In the Circuit Court, the government continued to defend its charging theory. Consolidated Brief for the United States, pp. 49-51. The government's argument was that the common employment of the defendants as police officers and the involvement of the mail fraud defendants in the extortion/bribery acts, along with temporal and spatial factors allowed for the belief that the RICO counts bonded the extortion and mail fraud charges. Of course, as the Circuit Court concluded, Sheehan and Nave's involvement in the extortion acts was an insufficient basis for inclusion of the mail fraud scheme. 898 F. 2d at 247.

E. A Flawed Prejudice Analysis

The Circuit Court, upon a review of the petitioners' several claims regarding the allegations and the evidence of the mail fraud crimes, found that only their variance argument had merit. The court announced the standard under which prejudice would be examined:

"Variance requires reversal only where defendants demonstrate that the difference in proof somehow affected their 'substantial rights' so that they were 'significantly prejudiced.' [*United States v. Glenn*, [828 F. 2d 855] at 859-60 . . . "

898 F. 2d at 248. (other cases omitted) The court conducted a prejudice inquiry²¹ that first considered whether, as to Nave and Sheehan, there was any "harmful spillover", and found none. 898 F. 2d at 248. Next, the court reviewed the prejudice claims of the other petitioners, again, looking at the issue principally from the standpoint of "spillover", i.e., whether "the UL evidence, admitted without limitation, tainted the jury's perception of the case." *Id.* Because the extortion crimes, in the view of the court, "were amply proven and seemed far more reprehensible than the mail fraud crimes, evidence of the latter could not, and did not prejudice them." The court concluded this review with its "sockdolager" remarks.²²

In *United States v. Lane*, 474 U.S. 438 (1986), this court resolved the conflict in the Circuit Courts as to whether Rule 8 misjoinder is inherently prejudicial or is governed by Rule 52(a). It was held by the Court that: "[A]n error involving misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 499 (quoting *Kotteakos*, *supra*,

²¹ See, *supra* p. 16.

²² *Id.*

328 U.S., at 776). The court reviewed the record in the case to evaluate the prejudice claim and reached the conclusion that any error there was "failed to have any 'substantial influence' on the verdict." *Id.*, at 450.

The factors in the record of the case that the court noted in reaching the harmless error conclusion, were: 1) the "overwhelming evidence of guilt" shown in the record; 2) when evidence on the misjoined count was introduced "the District Court provided a proper limiting instruction, and in the final charge repeated that instruction and admonished the jury to consider each count and defendant separately"; and 3) the same evidence on the misjoined count "would likely have been admissible on joint retrial of the . . . [other counts] under Federal Rule of Evidence 404(b)". *Id.*, at 450.

It should follow that the prejudice inquiry for a variance error and for misjoinder is identical, since both are explorations conducted under the standards of Rule 52(a). See, *United States v. Castro*, 829 F. 2d 1038, 1044 n.18 (11th Cir. 1987). Variance and misjoinder are similar errors, in that each concerns evidence of crimes that are presented in the trial evidence. The argument can, perhaps, be made that generally variance is not as harmful as misjoinder, but in the situation where, as here, a series of criminal acts perpetrated by two of the defendants are admitted, which are irrelevant to the case, the prejudice inquiry has to critically focus on the third step in the *Lane* analysis: would the evidence on the offending counts "likely have been admissible on joint retrial of the . . . [other counts] under Federal Rule of Evidence 404(b)" *Id.* at 450. Accord: *United States v. Hogan*, 886 F. 2d 1497, 1506 (7th Cir. 1989); *United States v. Velasquez*, 772 F. 2d 1348, 1355 (7th Cir. 1985); *United States v. Hatcher*, 680 F. 2d 438 (7th Cir. 1982) (dicta); *United States v. Attanasio*, 870 F. 2d 809, 815 (2nd Cir. 1989) (dicta).

A necessary first step that the Circuit Court should have taken in its prejudice assessment was whether evidence of the mail fraud crimes would have been admissible against any of

the defendants in a joint trial of the seven defendants upon an indictment that did not contain the mail fraud allegations. This inquiry as to the admission of "other crimes" requires treatment under Rule 404(b). Tested by the Rule's standards, it is obvious that in a trial, free of the mail fraud charges, the evidence would not have been admissible against, even Sheehan and Nave. The "spillover" effect of evidence, admissible against some of the defendants in a joint trial and inadmissible against others, is deemed avoided, or at least reduced, as to the latter group by appropriate limiting instructions. But, the wholesale, unlimited production of a pattern of crimes by some of the defendants that is not admissible for any purpose, permitted the jury to draw the pernicious conclusion that it must have had some relevance to the RICO charges in which all the defendants were charged and to the other charges, as well, when in fact, the evidence was irrelevant and highly prejudicial as to undermine the fair trial rights of all the defendants. See, *United States v. Hudson*, 843 F. 2d 1062, 1069-70 (7th Cir. 1988).

ARGUMENT II.

THE COURT'S JURY INSTRUCTIONS ON THE MENS REA ELEMENT OF THE HOBBS ACT EXTORTION COUNTS WERE SERIOUSLY FLAWED AND THEREBY DEPRIVED THE PETITIONERS OF DUE PROCESS

1. Introduction

The offense of extortion, defined in the Hobbs Act, 18 U.S.C. Sec. 1951, was the centerpiece of the government's case against the petitioners in the court below. For instance, in the two RICO counts, the "pattern of racketeering activity", consisted of an enumeration of 63 separate "Racketeering Acts", with all but 18 of them alleging some species of Hobbs Act extortion. Of the 58 counts in the indictment, 39

charged a Hobbs Act violation of one type or another. Needless to say, the government's trial evidence was overwhelmingly devoted to the Hobbs Act offenses.

Requests for instructions were submitted to the court by the defendants' and the government. In the package of the Defendants Joint Request for Instruction, there was one (p. 16) that related to the Hobbs Act charges.²³ Additionally, the defendants requested that the court instruct the jury in accordance with Instruction 50-25, Sands, *Modern Federal Jury Instructions*, Vol. 2 (1986).²⁴

The court failed to instruct the jury as particularly requested by the defendants. Moreover, the court's charge did not include the substance of the defendant's requests. The defendants' request focused, in part, upon the *mens rea* (intent) element of extortion under the Hobbs Act. The defendants preserved the court's error, in failing to instruct about the intent element, by proper objections before the jury retired (47-42, 94-100). See Rule 30, F.R.Cr.P. Even so, the court in its further instructions to the jury (47-110 to 112) failed to correct the errors.

²³ In part, this instruction said: "To prove a violation of the Hobbs Act, which is the name used to describe the crime charged in Title 18 of the United States Code, Section 1951, it is necessary for the government to prove beyond a reasonable doubt that...(3) the official was aware of why the donor gave the property; (4) *the official affirmatively did something in his capacity as a public official with the intent to induce the giving of the property*; and, 5) that the corrupt inducement and acceptance of the thing of value affected interstate commerce." (emphasis supplied)

²⁴ The Sands Instruction states the *mens rea* concept, which is applicable to the "under color of official right" branch of Hobbs Act extortion, and says, in its concluding paragraph:

Unless you decide, beyond a reasonable doubt, that the defendant knew the giver's consent was wrongfully obtained that is, that the money, goods or services were given in connection with the defendant's misuse of his official position rather than being given voluntarily — you cannot convict the defendant.

The error committed by the Court regarding the instructions on the *mens rea* element of the Hobbs Act extortion offenses touched every one of the Hobbs Act counts in the indictment, which compels reversal of the petitioners' convictions on those counts and the convictions on the two RICO counts as well.²⁵

²⁵ The two RICO counts in this case asserted that the pattern of racketeering engaged in by the defendants were multiple "Racketeering Acts." In most instances, these "Acts" were charged alternatively as: 1) some branch of extortion under the Hobbs Acts; or, 2) as a violation of the Massachusetts law or Common Law proscribing the receipt of bribes or gratuities and conspiring to do so. In order to convict any defendant under the RICO counts, the jury was required to find that as to that one he committed two of the Racketeering Acts charged against him. 18 U.S.C. Section 1961(5). However, the jury was not asked in the event of guilty verdicts on the RICO counts to return special findings, indicating which of the alternate "Racketeering Acts" were the basis for the verdicts. Therefore, if the convictions on the Hobbs Act are found wanting, the Court must also vacate the convictions of Appellants Boylan, Carey, Connolly, Kilroe and McCormick, on the RICO counts. See, *United States v. Kattar*, 840 F. 2d 118, 123 (1st Cir. 1988) ("This [result] comports with the rule that 'a general verdict must be set aside if the jury was instructed that it could only rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have been reached exclusively on the insufficient ground [cases cited]'") Only the appellants Nave and Sheehan were named in additional "Racketeering Acts" that were not derived from the Hobbs Act (See Racketeering Acts under Section J). They were also convicted on the substantive counts of the indictment which corresponded to these "Acts" (counts 40 through 58). The convictions of Nave and Sheehan on the RICO counts under the postulation above is different from the other appellants. Nonetheless, it is urged that their convictions on the RICO counts should also fall, if the Hobbs Act convictions are vacated, despite their convictions on other counts. See *United States v. Holzer*, 840 F. 2d 1343, 1350-52 (7th Cir. 1988) Justice White has noted that there is a conflict among the circuits on the question whether a RICO conviction may stand when some of the defendant's convictions for the predicate offenses are overturned but two or more are not. See, *McCulloch v. United States*, 108 S. Ct. 337 (1987) (White J., dissenting from denial of certiorari.)

2. Criminal Intent In A Hobbs Act Extortion Offense

A) Under Color Of Official Right And Exploitation Of The Payor's Fear Of Economic Loss Or Harm

Many federal courts have reached the decision that the *mens rea* element of a Hobbs Act extortion offense under color of official right is criminal intent.²⁶ *United States v. Aguon*, 851 F. 2d 1158, 1167-69 (9th Cir. 1988) (en banc); *United States v. O'Grady*, 742 F. 2d 683, 696 (2nd Cir. 1984) (en banc) (Graafeiland, Cir. J., concurring in part and dissenting in part); See also, *United States v. Egan*, 860 F. 2d 904, 90809 (9th Cir. 1988) (applying *United States v. Aguon*, supra); *United States v. Trotta*, 525 F. 2d 1096, 1099, n. 5 (2nd Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States v. Dozier*, 672 F. 2d 531, 54142 (5th Cir.), rehearing denied, 677 F. 2d 113, cert. denied, 459 U.S. 943 (1982); *United States v. Scacchetti*, 668 F. 2d 643, 64849 (2nd Cir.), cert. denied, 457 U.S. 1132 (1982); *United States v. Kovic*, 684 F. 2d 512, 515 (7th Cir. 1982); *United States v. Arambasich*, 597 F. 2d 609, 611 (7th Cir. 1979); *Bianchi v. United States*, 219 F. 2d 182, 194 (8th Cir.), cert. denied, 349 U.S. 915 (1955), rehearing denied, 349 U.S. 969.

A Hobbs Act charge based on the theory that the defendant induced the payment of money from another by exploitation of the victim's fear of economic loss, requires the prosecutor to prove that the defendant intended to exploit the fear of the victim. *United States v. Duhon*, 565 F. 2d 345, 351 (5th Cir. 1978); *United States v. Gerald*, 624 F. 2d 1291, 1299 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981); *United*

²⁶ See, Note, *Limiting Expansion Into Public Corruption Under The Hobbs Act: United States v. O'Grady*, 18 Conn. L. R. 183, 204, n. 122 (1985) ("The requirement of specific intent is found not in the Hobbs Act itself, but in the common law of extortion, 'where the taking must be corrupt, that is, there must be an intention on the part of the accused to take something to which he is not entitled.' A. Burdick, *Law of Crime*, Sections 277, 397 (1946)")

States v. Haimowitz, 725 F. 2d 1561, 1572 (11th Cir.), cert. denied, 469 U.S. 1072 (1984).

The crucial *mens rea* element of Hobbs Act extortion is specific intent, rather than general intent. Unquestionably, the law is that "[t]he government must prove criminal intent [in a Hobbs Act extortion] on the part of the accused." *United States v. Price*, 617 F. 2d 455 at 459 (7th Cir. 1979). Moreover, "[w]here intent of the accused is an ingredient of the crime charged, its existence is...a jury issue." *Morissette v. United States*, 342 U.S. 246, 274 (1952)

B) The District Court's Instructions On The Hobbs Act Extortion Offenses: *Mens Rea*

The government tendered a stock instruction, Request No. 14, defining "willfully" and "knowingly". The court gave this instruction at the outset of the charge to the jury, as a part of his instructions on general law principles.²⁷ These definitions were not thereafter repeated to the jury, and, more particularly, the definitions were not linked to the various offense to which they pertained.²⁸ The court did not expressly inform the jury about the mental state that the government had to prove regarding the Hobbs Act offenses; nor what it had to find about the defendants' mental state beyond a reasonable doubt before they could convict.

²⁷ *Supra*, at pp. 10, 11. The court's instruction defining "willfully" and "knowingly", (n. 1, *supra*), is found at 1 E. Dewitt & C. Blackman, *Federal Jury Practice and Instructions*, Section 13.05. In *Liparota v. United States*, 471 U.S. 419 (1985), the Court noted that stock instructions on "specific intent", such as the one tendered by the defendant in that case, (*Id.* at 422, n. 3), have been criticized as too general and potentially misleading. The court suggested that: "A more useful instruction might relate specifically to the mental state required under [the particular statute] and eschew use of difficult legal concepts like 'specific intent' and 'general intent.'" 471 U.S., at 434, n. 16.

²⁸ Though the court assured the jury that when he read the statutes involved in the case to the jury, he would define the terms ("willfully" and "knowingly"), again, *supra*, p. 10, this was not done.

The jury charge "failed to provide adequate criteria by which the jury could determine whether or not [the defendants] had the requisite specific intent"²⁹ to commit any of the Hobbs Act offenses.

The petitioners' complaint is that the district court failed to give the jury a contemporaneous and contextual explanation of the intent element of the various Hobbs Act offenses. As the court was defining and explaining the Hobbs Act extortion offenses charged in the case (47-43-51), it was required to tell the jury that as to each type the definition, applicability and interaction of the *mens rea* element.³⁰

C) The Circuit Court's Treatment Of The *Mens Rea* Issue.

The definition of the *mens rea* element of Hobbs Act extortion offenses is not a matter of unanimity in the federal

²⁹ *United States v. Barclay*, 560 F. 2d 812, 816 (7th Cir. 1977)

³⁰ At the conclusion of the charge, and before the jury retired, counsel for the defendants registered their objection to the refusal of the court to give their requested instructions (47-72). In the colloquy, counsel specifically called the court's attention to *Sands*, No. 50-25 (*supra*, ft. n. 9); and "stress[ed] the court to consider" instructing the jury in accordance with the last paragraph. (47-96) After reading that part of the instruction to the court, counsel told the court that the language was particularly appropriate . . . because the instructions [given by the court] don't focus on the recipient's [defendant's] state of mind." (47-96) Additionally, counsel told the court that "a clear element of the case [is] the mental state of the defendant . . . this jury must be instructed that in receiving it, the defendant knew he got the money not as a voluntary contribution, gift, benefit, whatever, but because he knew the giver was motivated by the misuse of official position." (47-97) The defendant's objections and remarks in this vein continued: " . . . there has to be a corrupt intent in receiving the money under the Hobbs Act." 47-98; " . . . I think that the court has to refocus this jury on the intent in the mind of the recipient, that is, he was getting the money . . . because he knows the giver is expecting him to misuse his office in one way or another." *Id.* Despite the objections, the court did not amend or add to its charge on what the government had to prove concerning the defendant's mental state.

courts. Some courts adhere to the proposition that the Act defines extortion as a crime of general intent.

In the present case, the First Circuit specifically held for the first time that "[n]o matter what type of extortion is alleged, specific intent is a part and parcel of a Hobbs Act conviction." 898 F. 2d 230, at 253 (1st Cir. 1990). It was the court's opinion that in this case, "the definitions employed by the court below adequately conveyed the essence of the *mens rea* requirement for Hobbs Act extortion." *Id.* The Circuit Court found that the lower court's definition of the terms "willfully" and "knowingly", which were given "[n]ear the beginning of the charge", and "in enumerating the elements of the Hobbs Act offenses, the court twice stated that the government had to prove that 'defendant willfully and knowingly obtained property from the person'", *Id.*, constituted adequate directions to the jury on the *mens rea* element. In the end, the court concluded that "the charge as a whole made plain that the definitions [of willfulness and knowingly given once at the beginning of the charge] applied across the board." *Id.*

The Circuit Court found that the jury was adequately instructed about the *mens rea* element of the Hobbs Act offenses in the case by the "across the board" methodology employed by the district court. In other words, it was held that the essential element of intent was sufficiently explained to the jury in the definition of two words of art, given by the court during its discussion of general matters at the outset of the instructions, with the admonition that the definitions "will apply to these terms, throughout the remainder of these instructions." *Id.* at 253, quoting the district court.

The Circuit court obviously concluded that since the words "willfully" and "knowingly" were defined once in the charge, it was not necessary to repeat the definitions every time their meanings were involved in crimes charged in the indictment. The practice has been accepted that if the trial court gives a proper instruction on a particular element,

which is common to several of the crimes charged, the court need not fully repeat it every time the court later lists the requirements for the subject offenses, especially if the court references its earlier instruction when it later explains one of the subject offenses to the jury. See, *United States v. Hadelman*, 559 F. 2d 31, at 115 (D.C. Cir. 1976),³¹ *cert. denied*, 431 U.S. 933 (two cases), *reh. denied*, 433 U.S. 916.

In the instant case, the court never fully and particularly defined the specific intent element of the Hobbs Act offenses. Though, the elements of specific intent are knowingly and willfully, *United States v. Cox*, 696 F. 2d 1294, 1298 (11th Cir. 1983), a bare definition of those terms by the court, with no accompanying explanation to the jury that the definitions concern and relate to an important component of each of the offenses on trial, is plainly inadequate. And, even if the naked definitions did provide adequate criteria by which the jury could determine whether the defendants had the requisite intent to commit the offenses, isolating this important explanation from the discussion of the offenses themselves, with no reference to the information, was tantamount to omitting it all together. This was "plain error", affecting the substantial rights of the petitioners (Fed. Rules Criminal Procedure

³¹ When the trial court reached its discussion of Count Two (a specific intent crime) in *Hadelman*, the court reminded the jury: "I have already instructed you on what we mean when we use the words specific intent, knowingly and 'willfully'." Continuing, the court went on to say, in part: "The words center on the purpose an individual has when he does something, that is, his intent, his will. Specific intent is an important element of Count Two." 559 F. 2d, at 114. To the appellant's argument on appeal that it was error for the court to fail to give the jury a more precise and elaborate explanation of the intent element in Count Two, the Circuit Court answered, "[s]ince the requirements of a finding of specific intent . . . had been explained earlier [see *Id.*, at p. 113, and n. 226, p. 114] and were cross referenced here, the failure to define the terms in detail again does not constitute error. Once a proper instruction is given, it need not be fully repeated on every subsequent occasion when it is referred to in listing the requirements for conviction." 559 F. 2d, at 115. (footnote omitted).

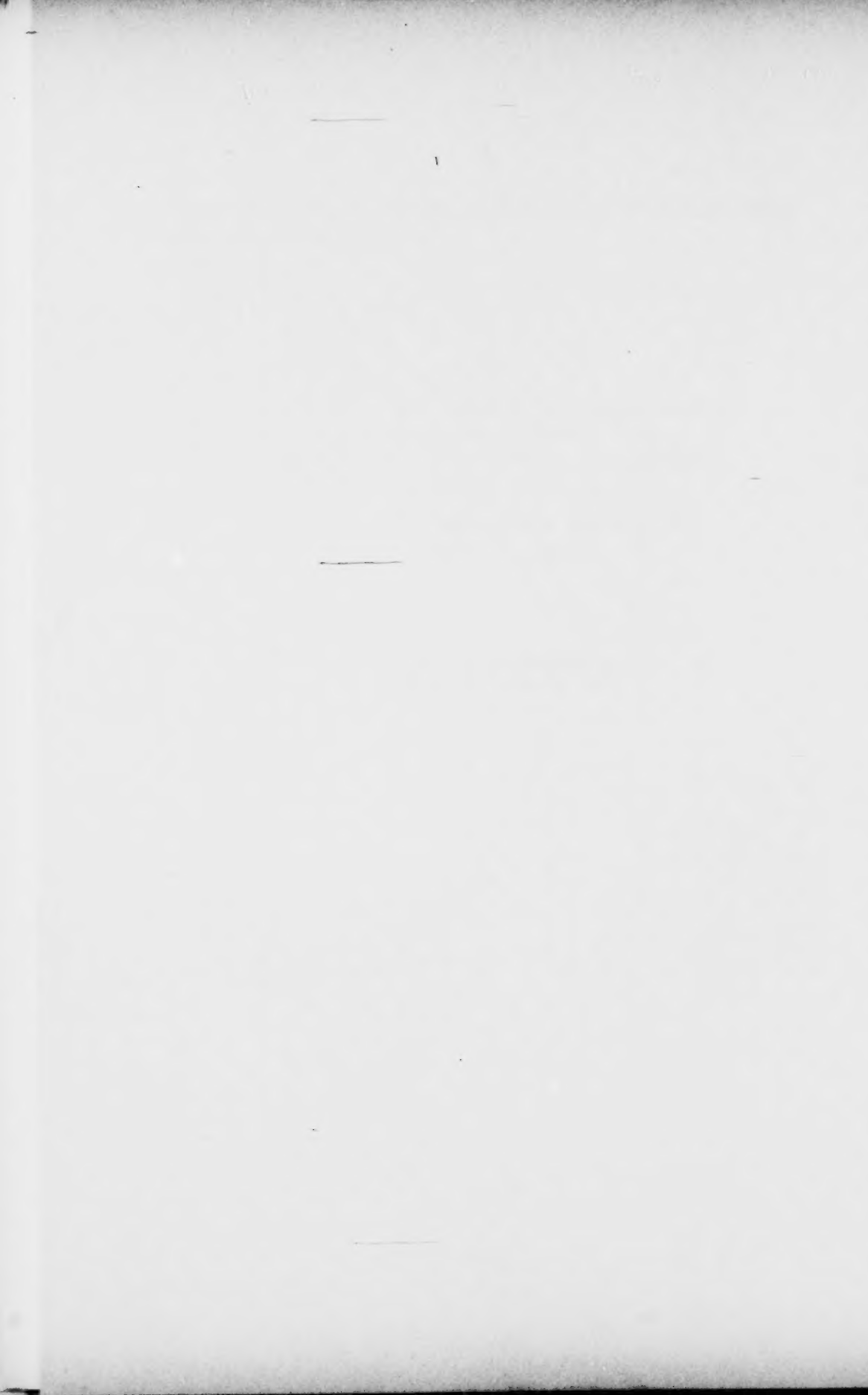
52(b), which this Court should notice and reverse the judgment of the Circuit Court.

Respectfully Submitted,

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**COUNSEL FOR
PETITIONERS**

APPENDIX



APPENDIX A

Supreme Court of the United States

No. A-874

PETER BOYLAN, et al.,

Petitioners

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 12, 1990.

/s/ William J. Brennan, Jr.

Associate Justice of the
Supreme
Court of the United States

Dated this 6th day of June, 1990.



APPENDIX B

UNITED STATES OF AMERICA, v.	<i>Appellee,</i>
PETER BOYLAN,	<i>Defendant, Appellant.</i>
UNITED STATES OF AMERICA, v.	<i>Appellee,</i>
JOHN E. GAREY,	<i>Defendant, Appellant.</i>
UNITED STATES OF AMERICA, v.	<i>Appellee,</i>
THOMAS J. CONNOLLY,	<i>Defendant, Appellant.</i>
UNITED STATES OF AMERICA, v.	<i>Appellee,</i>
MATTHEW A. KILROE,	<i>Defendant, Appellant.</i>
UNITED STATES OF AMERICA, v.	<i>Appellee,</i>
JOHN F. MCCORMICK,	<i>Defendant, Appellant</i>
UNITED STATES OF AMERICA, v.	<i>Appellee,</i>
KENNETH J. NAVE,	<i>Defendant, Appellant.</i>
UNITED STATES OF AMERICA, v.	<i>Appellee,</i>
FRANCIS X. SHEEHAN.	Nos. 88-2214 to 88- 2220.

U.S. v. BOYLAN
Cite as 898 F. 2d 230 (1st Cir. 1990)

United States Court of Appeals,

FIRST CIRCUIT.

Hear Dec. 6, 1989.

Decided March 14, 1990.

Thomas R. Dyson, Washington, D.C, with whom Albert Cullen, Jr., Boston, Mass., Robert D. Luskin, Jonathan A. Knee, Powell, Goldstein, Frazier & Murphy, Clifford M. Sloan, and Onek, Klein & Farr, Washington, D.C., were on brief, for appellant Thomas J. Connolly.

Robert D. Luskin, with whom Jonathan A. Knee, Powell, Goldstein, Frazier & Murphy, Clifford M. Sloan, and Onek, Klein & Farr, Washington, D.C., were on brief, for remaining appellants.

Paul Buckley, Milton, Mass., on brief for appellant Peter Boylan.

Regina Quinlan, Boston, Mass., on brief, for appellant John Carey.

Anthony Traini and Leppo & Traini, Randolph, Mass., on brief, for appellant Matthew A. Kilroe.

Anthony M. Cardinale, Boston, Mass., on brief, for John F. McCormick.

Paul F. Markham, Boston, Mass., on brief, for appellant Kenneth J. Nave.

Robert Muse, Washington, D.C. on brief, for appellant Francis X. Sheehan.

Diane Kottmyer and James B. Farmer, Sp. Attys., U.S. Dep't of Justice, with whom Wayne A. Budd, U.S. Att., Boston, Mass., was on brief, for U.S.

Before TORRUELLA and SELYA, Circuit Judges, and COFFIN, Senior Circuit Judge.

SELYA, Circuit Judge.

Oliver Wendell Holmes is generally credited with pointing out that “we live by symbols” — and few symbols are better recognized than the lawman’s badge, like other emblemata of power, can be tarnished. These appeals present what the government believes — and defendants steadfastly deny — is a classic example of the genre.

I. TRAVEL OF THE CASE

A federal grand jury returned a 58-count indictment against appellants, former members of the Boston Police Department (BPD). During the relevant period, defendant Carey was a detective sergeant. Detectives Boylan, Kilroe, McCormick, Nave and Sheehan were under Carey’s supervision. Defendant Connolly was Sheehan’s partner for a time. The indictment charged the defendants with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), by participating in the affairs of an enterprise, the BPD, through a pattern of racketeering activity, 18 U.S.C. Sec. 1962(c) (1982), and with racketeering conspiracy, 18 U.S.C. Sec. 1962(d) (1982). The remainder of the indictment was checkerboarded, charging various defendants with various violations, and combinations of violations, of the Hobbs Act, 18 U.S.C. Secs. 1951, 1952 (1982), certain mail fraud statutes, 18 U.S.C. Secs. 1341, 1342 (1982), and the like. The specific offenses did double duty, serving (with some supplementation) as predicate acts undergirding the RICO charges.

Count 33 was dropped before trial. The defendants were tried together on the remaining charges. With minor exceptions — the jury acquitted Nave and Sheehan on one Hobbs Act count and acquitted Nave on a mail fraud charge — all defendants were convicted on all counts. Following the denial

of sundry posttrial motions and the imposition of sentence, appeals were taken across the board.

Initially, we set forth the case's background. We then turn to the meat of the defendants' menu of assigned errors, discussing the more colorable contentions and rejecting the remainder without comment. In the interests of clarity and for ease in reference, we have prepared an appendix summarizing the indictment and will henceforth assume the reader's familiarity with it.

II. BACKGROUND

In Boston, a Licensing Board (Board) regulates the dispensation and service of liquor, licensing vendors and enforcing state and municipal laws and regulations governing, *inter alia*, sales of alcoholic beverages, occupancy limits, conduct of licensed premises, and hours of operation. If rules are broken, the Board may impose penalties ranging from a warning, to probation, to suspension or revocation of an establishment's license. All Boston police detectives are considered agents of the Board responsible for inspecting licensed premises and reporting infractions; they are empowered to apply for criminal complaints and file charges with the Board as may be necessary.

Detectives are also eligible for private duty on their own time — duty which can be quite lucrative. The BPD's rules prohibit policemen from providing such private services except through official channels, i.e., in accordance with the police unions' collective bargaining agreements and BPD regulations, and for set fees. These rules safeguard the equal distribution of income-supplementing opportunities, ensure that matter remain aboveboard, and deter potential abuses. Officers are flatly prohibited from accepting more generous remuneration or performing details not posted and assigned through the proper departmental offices.

Between 1975 and 1986 each defendant was assigned for some period of time to work nights in District 4, encompassing Back Bay, the Fenway section, and certain other Boston neighborhoods. District 4 is a hotbed of nightclubs, saloons, and other establishments, including some so-called "gay bars," where appetites can be satisfied and thirsts slaked. According to the indictment, many of the alleged offenses occurred when defendants accepted cash payments outside the rules from proprietors of licensed establishments. Typically, the payments — anywhere from \$100 to \$600 per officer per occasion — were made during holiday season and at "vacation time." The defendants were said to have reciprocated by rendering favors ranging from the relatively innocuous (e.g., the provision of escort services when bank deposits were made; preferentially quick responses to disturbances) to the downright sinister (e.g., behind-the-scenes "help" in handling "problems" with the police; quashing of charges; influencing the Board's regulatory and enforcement actions). In the indictment, these events were clustered into several series of racketeering acts. Each series bore a letter designation corresponding to a separate person with some interest in a particular locus.

III. RACKETEERING

We begin with the contention that the evidence failed to show either a linked pattern of racketeering activity or a RICO conspiracy.

A. Evidentiary Sufficiency

Defendants claim that the aggregate proof indicated only dubious free-lancing by some officers or, at worst, a cluster of

small, disconnected, nickel-beer conspiracies.¹

1. Series A. Norman Chaletzky owned interests in three nightclubs: 88 Queensbury; the 1270; and the Kentucky Tavern. From 1979 to 1986, Chaletzky paid Sheehan and Connolly semi-annually, in \$500 increments, so that they would remain his "friends" rather than become his "enemies." In return, Connolly gave Chaletzky his home telephone number and the telephone number for the detective's room at the precinct house. He promised that he and Sheehan would hold themselves available to "help" with license violations and would deal with the authorities on Chaletzky's behalf.

2. Series B. Five defendants (Boylan, Carey, Kilroe, McCormick, and Nave) received money from Joseph

¹ The charged sub-conspiracies were as follows:

<u>Count</u>	<u>Series</u>	<u>Defendants Charged</u>
3	A	Connolly, Sheehan
12	B	Boylan, Carey, Kilroe, McCormick, - Nave
21	C	Kilroe and "persons unknown"
27	F	Kilroe, Nave, Sheehan
34	I	Boylan, Connolly, Nave, Sheehan
58	J	Nave, Sheehan

Except for count 58, all of the sub-conspiracies implicated the Hobbs Act and were characterized by the government as predicate acts for RICO purposes. Count 58 was brought under 18 U.S.C. Section 371 and was, therefore, not chargeable as a predicate offense under 18 U.S.C. Section 1961. Nevertheless, the underlying scheme — defrauding the United States of a) Revenue was so charged. We summarize the alphabetized series of racketeering acts which the indictment alleged and the proof depicted, basing our narrative upon "the evidence in its totality, taken in the light most flattering to the government, together with all legitimate inferences to be drawn therefrom, in an effort to ascertain whether a rational trier of the facts could have found the appellant[s] guilty beyond any reasonable doubt." *United States v. Tierney*, 760 F. 2d 382, 384 (1st Cir.), *cert. denied*, 474 U.S. 843, 106 S. Ct. 131, 88 L.Ed.2d 108 (1985).

McGowan, a co-owner of the 1270, during the period 1983-85. The amounts ranged from \$200 to \$600 per payment. In return, the detectives forewarned McGowan of inspections, assisted him in "fixing" citations, and interceded with the Board personnel to sidetrack adversary proceedings. The interventions appear to have been effective: during the relevant period, there were no disciplinary hearings involving the 1270 despite numerous reports of serious violations occurring there.

3. Series C and D. These counts involved Thomas Moloney, owner of Frank 'N Steins (FNS) and Play It Again Same's (PIAS), and co-owner, with Warren Frank, of Patrick Brady's Grand Back Bay Pub and Grill (Brady's). From 1980 to 1986, Moloney made periodic payments of \$200 to \$300 to Kilroe and the defendant who happened to be Kilroe's partner at the time. In December 1984, Frank also paid Kilroe \$200. Kilroe gave Moloney the telephone number of the detective's room, offered escort services, tried to exert influence when a citation for overcrowding was issued to PIAS, and prompted an unusually celeritous police response when an untoward incident occurred at FNS. Kilroe volunteered escort services to Frank and gave him a business card on which McCormick's name was written.

4. Series F. The Blacke brothers, George and Lawrence, operated Nine Landsdowne. They made frequent payments to Nave and Sheehan in the 1985-86 time frame. The detectives gave the brothers their home telephone numbers and assisted them in diverse ways: for example, the officers "straightened out" a patron who had frightened the Blackes; on another occasion, they resolved a dispute which arose out of a fight in the club. Nave and Sheehan would pick up George Blacke in their police cruiser, ask if he "needed anything" and if "everything was okay;" Blacke would then pay them \$100 apiece "to stay in good." The Blackes made other payments to Nave, Sheehan, Boylan, and Kilroe.

5. **Series H.** Connolly rendered unauthorized escort services to John Moriarty, the manager of the Cafe Budapest. Connolly did the honors personally for the most part, often in a police car. Sheehan frequently accompanied him. In return, Connolly received free meals and drinks for himself, his family and friends. He also accepted interest-free loans.

6. **Series I.** Jean Tasse, an employee of a corporation which operated two nightclubs (Metro and Spit), paid Boylan, Connolly, Nave, and Sheehan in excess of the established rates for police details and made other cash payments to them. To reciprocate, Nave, Sheehan, and Boylan came to the corporation's assistance when it was cited for violations.

7. **Series J.** United Liquors (UL), a wholesaler, owned a billboard overlooking Fenway Park. Baseball fans, eager to avoid mounting ticket prices, often mounted the billboard instead to watch Boston Red Sox games in a cost-effective manner. Mary Fortier, a UL employee, called Sheehan in 1983 to arrange a security detail to ward off sign-perchers. Sheehan did not process the request through proper channels. Rather, he supplied Fortier with the names of policemen whom he said had performed the work and stipulated amounts to be paid to each. Following Sheehan's instructions, Fortier mailed checks to Sheehan's address for him to distribute to the designated police officers. The list, however, was bogus. Except for checks written to Nave (which Nave negotiated) and one check to Boylan, *see infra* note 5, Sheehan forged the payees' signatures and kept the money. This practice continued through 1985; 96 checks, totalling some \$14,000, were transmitted. Neither Nave nor Sheehan reported the income for tax purposes.

At the expense of some repetition, we also scrutinize the evidence from a slightly different coign of vantage, taking the defendants one by one, in alphabetical order.

1. **Boylan.** The evidence showed that from 1984 through 1986 Boylan helped Carey and Kilroe "fix" numerous citations against the 1270 by intervening with line officers. A good illustration concerns a 1984 citation stemming from the alleged rape of a minor at the 1270. Boylan, Carey, and Kilroe reported periodically to McGowan on their efforts to influence members of the Board and Shelve the citation. At Christmas that year, Boylan's payment from the 1270 was picked up by Carey (who collected payments for a number of the defendants). The citation eventually came to naught.

In 1983-85, Boylan was one of several officers (including Nave, Sheehan, and Connolly) to whom Tasse paid \$900 annually. Boylan contacted Nave and Sheehan for Tasse when Tasse could not do so directly. The trio teamed to cover up violations. According to Tasse's testimony, Boylan collected money not only for himself, but on occasion for Nave, Sheehan, and other defendants. Boylan also accepted other payments, e.g., \$200 from Frank (who had given the money to Kilroe to split with Boylan) and \$200 from Lawrence Blacke (also via Kilroe).

2. **Carey.** Carey was introduced to McGowan by Sheehan. Carey, Boylan, and Kilroe visited McGowan at the 1270 in 1984. Carey told him that they had come to be "taken care of." After receiving \$300 each, Carey told McGowan to call if he had any "problems." Carey returned to the 1270 later that summer to pick up money for another detective. He told McGowan to let him know whenever McGowan wanted to have an after hours party. In November, Carey worked with Kilroe and Boylan to prevent prosecution of the rape citation described earlier. McGowan gave Carey \$600 to be divided between the officer who wrote the citation and a Board employee.

Tape recorded conversations revealed that in the fall of 1984 Carey received \$1400 from McGowan for himself, McCormick, Boylan, Kilroe, and a fifth person. Carey stated

that McCormick asked him to make the collection. He acknowledged that another officer had been paid off and that McCormick was involved. Carey told McGowan that he and his cohorts "can assist you like we have in the past," and warned McGowan against attempting to bribe a particular (honest) deputy. Carey also told McGowan about a time when he, Boylan, and Kilroe were miffed because they thought they had been shortchanged in a payoff.

The record shows that Carey gave tit for tat. A typical example of illicit assistance occurred in 1985. In respect to an overcrowding violation, Carey told McGowan that court proceedings would be pretermitted and that "we'll take care of the Board." His prediction proved prophetic: neither a court action nor a Board hearing eventuated. Carey and Kilroe later explained to McGowan how they ensured that the complaint would not be prosecuted. In 1985 and 1986, Carey, Boylan, and Kilroe derailed other charges by intervening with the detectives who issued the citations. When Carey was transferred in June 1985, he advised McGowan that another detective would continue to "take care of" the 1270 and that McGowan could pay for the service through Carey.

3. Connolly. Chaletzky was introduced to Connolly and Sheehan in 1979. The detectives told him that they "oversaw" the clubs in District 4 and that if Chaletzky had any problems with the police he should contact them. In exchange, Connolly and Sheehan were each to receive \$500 at Christmas and at vacation time. Connolly picked up the money twice a year at Chaletzky's office, sometimes accompanied by Sheehan. Sheehan also received \$150 or \$200 from Chaletzky through Connolly for Sheehan's efforts in respect to a homicide investigation involving 88 Queensbury. Connolly asked for extra money after he expedited a gun permit that Chaletzky had wanted.

McGowan testified that Connolly and Sheehan came to the 1270 one night and told him he was "in trouble" for overcrowding and serving a minor. After being informed that

the 1270 was part of Chaletzky's family of clubs, the pair never issued a citation. When Connolly was transferred, he told Chaletzky he could still "help" if there were any "problems" and passed along his new telephone number.

As already recounted, Connolly, via Nave, received several payments from Metro and Spit. And, he accepted free meals, beverages, and loans from Cafe Budapest in return for escort services and the like.

4. Kilroe. In December 1983, Kilroe became McCormick's partner (replacing Nave). They took money from McGowan. Kilroe was also involved with Carey and Boylan in quashing the rape citation against the 1270. During February 1985, Chaletzky gave Kilroe \$100 to take care of an overcrowding violation. Beginning around then, Kilroe and Boylan performed a series of mock inspections for the benefit of the 1270.

From 1979 to 1986 Kilroe picked up \$400-\$600 annually from Moloney. Boylan and McCormick were likewise implicated. On one occasion, Kilroe and Boylan were reprimanded after attempting to influence a police officer who had reported an overcrowding incident at PIAS. Moloney told Frank that Kilroe and his partners were the only police they could count on and that he (Moloney) paid them every Christmas. Kilroe also received \$400 for himself and Boylan from the Blackes after Nave suggested that such a payment was in order. In 1985, Kilroe and Boylan took George Blacke for a ride in their police car and told him they would "work with" him if there were ever a "problem." Once Kilroe scared off a disgruntled patron who had threatened Blacke; Blacke gave Kilroe \$400. Boylan acknowledged receiving half of the payoff.

5. McCormick. McCormick wrote a citation against the 1270 and the Board scheduled a hearing in September

1982. Sheehan told McGowan not to worry because the hearing was "all set." Sheehan was right. McGowan paid McCormick and Nave in January 1983. Later in 1983, after Kilroe became McCormick's partner, they collected money from McGowan. McCormick reminded McGowan to call if he had "any trouble." He informed McGowan that Nave was now Sheehan's partner and would henceforth take care of his own payments. McCormick also stated that Chaletzky (whom he regarded as McGowan's boss) was "paying off" Sheehan. In 1984, McCormick sent Carey to pick up the detectives' "vacation money" from McGowan (including money for McCormick). In March 1985, McCormick told McGowan that an overcrowding citation had been deep-sixed. And as mentioned earlier, Kilroe received cash from Moloney and split it with McCormick.

6. Nave. Nave's dealings vis-a-vis McGowan have already been chronicled and do not bear repetition. We add two lagniappes: (1) Nave did not allow Carey to retrieve his cut from McGowan. He did so himself, stating that he did not want "Carey and them picking mine up." (2) Nave also met McGowan at court and made inquiries on his behalf concerning matters which might be pending against the 1270.

The Blackes paid money to both Nave and Sheehan. In 1985-86, George Blacke paid them \$100 apiece every other month "to stay in good with them and to be able to call them if I needed them." The Blackes also began paying Kilroe and Boylan at Nave's suggestion. Nave and Sheehan responded promptly whenever the Blackes sought their help.

Nave also collected money from Tasse for himself and other officers (including Boylan, Connolly, and Sheehan). In exchange, the detectives gave special attention to Tasse's businesses. If one of his bars was cited, Tasse would call Nave or Sheehan.

7. **Sheehan.** Sheehan was involved with Connolly in protecting Chaletzky's clubs and often accompanied Connolly when money changed hands. It was Sheehan who introduced McGowan to Nave. Sheehan spoke with a Board member about a case against McGowan while it was pending; later, accompanied by Nave, he told McGowan: "Don't worry, it's all set." The 1270 received only a wrist slap; its license was not suspended.

Sheehan had a plethora of other connections to the operation. He and Nave participated together in dealings with the Blacks' both were in the group which took money from Tasse; and Sheehan aided Connolly in furnishing escort services to Cafe Budapest.

[1] Having done little more than scratch the tip of a fair-sized iceberg,² we limn the legal parameters of our inquiry. In order to convict a defendant for a RICO conspiracy, the government must prove:

- (1) the existence of an 'enterprise.' (2) that the defendant knowing joined the enterprise and (3) that the defendant agreed to commit, or in fact committed, two or more specified predicate crimes as part of his participation in the affairs of the enterprise.

United States v. Torres Lopez, 851 F. 2d 520, 528 (1st Cir. 1988), *cert. denied*, _____ U.S. _____, 109 S. Ct. 1144, 103 L.Ed.2d 204 (1989); *see also United States v. Angiulo*, 847 F. 2d 956, 964 (1st Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 314, 102L.Ed.2d 332 (1988). In this case, the existence of an "enterprise" as that term is used in the RICO statutes is not open to serious question. *Cf., e.g., Carroll v. Capalbo*, 563 F. Supp. 1053, 1058 (D.R.I. 1983) ("if it walks like a duck,

² We have refrained from reliance on evidence anent Series J (the UL scheme) for purposes of evaluating evidentiary sufficiency in respect to the RICO conspiracy. We believe that conduct to be cut from a somewhat different cloth and discuss the matter in more detail *infra* Part V.

and it squawks like a duck, it must be a duck"). And, if the evidence was sufficient to show a master conspiracy and defendants' union therein, the third furculum of the test was plainly achieved. Our inquiry thus reduces to whether such a conspiracy, knowingly joined by all defendants, was satisfactorily proven.

[2,3] Factors to be considered in deciding whether one, or many, conspiracies were demonstrated include the nature, design, implementation, and logistics of the illegal activity; the participants' *modus operandi*; the relevant geography, and the scope of coconspirator involvement. *See, United States v. Rivera-Santiago*, 872 F. 2d 1073, 1079 (1st Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 3227, 106 L.Ed.2d 576 (1989); *United States v. Drougas*, 748 F. 2d 8, 17 (1st Cir. 1984). The conspiratorial agreement need not be express so long as its existence can plausibly be inferred from the defendants' words and actions and the interdependence of activities and persons involved. *United States v. Glenn*, 828 F. 2d 855, 857 (1st Cir. 1987); *United States v. Flaherty*, 668 F. 2d 566, 580 (1st Cir. 1981). What counts is whether it can be said, on the totality of the evidence, that "all of the alleged coconspirators directed their efforts towards the accomplishment of a common goal or overall plan." *Drougas*, 748 F. 2d at 17; *Flaherty*, 668 F. 2d at 580, agreeing in the bargain to participate in the enterprise's affairs through the commission of at least two predicate crimes.

[4] To be guilty, colloquers need not be joined at the chest like Change and Eng. A RICO conspiracy does not demand total fusion of that all defendants participate in all racketeering acts, know of the entire conspiratorial sweep, or be acquainted with all other defendants. *See, United States v. Stratton*, 649 F. 2d 1066, 1074 (5th Cir. 1981); *United States v. DePeri*, 778 F. 2d 963, 975 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110, 106 S. Ct. 1518, 89 L.Ed.2d 916 (1986). "The fact that every defendant did not participate in

every transaction necessary to fulfill the aim of their agreement does not transform a continuing plan into multiple conspiracies." *Drougas*, 748 F. 2d at 17; see also *United States v. Garcia-Rosa*, 876 F. 2d 209, 223 (1st Cir. 1989), *cert. denied*,

U.S. , 110 S. Ct. 742, 107 L.Ed.2d 760 (1990). Nevertheless, the component parts must be linked together in such a way as to afford a plausible basis for the inference that an agreement existed.

[5,6] The evidence, we think, was more than ample to meet the applicable standard and tie the specified racketeering acts together. The prosecution may, of course, "prove its case through the use of circumstantial evidence so long as the total evidence, including reasonable inferences, is sufficient to warrant a jury to conclude that the defendant is guilty beyond a reasonable doubt." *United States v. Campa*, 679 F. 2d 1006, 1010 (1st Cir. 1982). Here, the similarities among the defendants and their activities were nothing short of striking: each defendant was a detective assigned to work nights in District 4 at some time during the indictment period; each received things of value, usually cash, from restaurant or nightclub owners in exchange for services not officially sanctioned; the targeted establishments were all in District 4 and all under the Board's aegis. The services themselves bore hallmarks of similarity. Moreover, there was a significant degree of interconnectedness. The defendants often cooperated with one another in collecting payments and in providing their specialized services. These common characteristics are precisely the kind of factors which can permissibly lead to the inference of a single conspiracy. See *Rivera-Santiago*, 872 F. 2d at 1079; *Drougas*, 748 F. 2d at 17. In a nutshell, the scenario portrays an association with far more than one "common thread" among the defendants. See *Stratton*, 649 F. 2d at 1073 n. 8.

[7] By the same token, we think that the proof of each defendant's complicity was convincing. Indeed, if the prosecution's version is accepted, there is little question that each

defendant was extensively involved in a shared plan preying upon licensed premises, with every defendant participating in at least two predicate acts. The jury could well have concluded that the defendants (1) schemed to conduct the BPD's affairs through racketeering acts in pursuit of their mutual goal, and (2) were imbricated as a group, viewing themselves as interchangeable in important respects. One defendant, Carey, literally supervised five of the other defendants. Save only for Connolly, each of the defendants was directly connected by word and deed to all other defendants in the course of at least one racketeering act. And Connolly was sufficiently implicated: his intercourse with Boylan, Nave, and Sheehan in four of the Series I crimes, to cite one handy illustration, bespoke his complicity. As we have said, an accused's lack of direct connection with, or knowledge of, every racketeering act or series, does not preclude the inference of a single conspiracy; nor does it preclude the inference that a particular defendant was a champion of the master conspiracy. *See Garcia-Rosa*, 876 F. 2d at 223; *Drougas*, 748 F. 2d at 17.

[8] To be sure, there was no proof of an express agreement. That is unsurprising: criminal conspiracies are by their nature clandestine. But an implied agreement can, and often does, suffice to ground a conspiracy charge. *See, e.g., Glenn*, 828 F. 2d at 857-58. Here, a tacit accord was easily inferable. Defendants often spoke to their victims about other victims or other defendants in words which plainly revealed that the crimes were interdependent. The conspirators' success at one club helped to facilitate unlawful arrangements with other clubs. Some of the schemes were conjoined, while others were indirectly connected through common actors. Within the totality of the evidence, these facts unquestionably provided sufficient basis to infer that "all of the alleged coconspirators directed their efforts towards the accomplishment of a[n] . . . overall plan." *Drougas*, 748 F. 2d at 17.

[9] In a criminal case, the jury's finding of guilt need not be inevitable. If the evidence, though susceptible to conflicting inferences, is adequate to permit a reasonable trier of fact to have found the essential elements of the charged crime beyond a reasonable doubt, a guilty verdict may appropriately be returned. *See Torres Lopez*, 851 F. 2d at 527-58. This case falls comfortably within those familiar parameters: on the record as a whole, a rational jury could have found beyond a reasonable doubt that an "enterprise" flourished; that a single master conspiracy overspread the serial sub-conspiracies; that each defendant knowingly and willfully joined in the illicit agreement to conduct the affairs of the enterprise (the BPD) through racketeering activity; and that each defendant perpetrated two or more predicate crimes in the course of the tawdry affair.

B. Jury Instructions: Conspiracy

Appellants next assert that the district court's charge enfeebled their defense by glossing over the multiple conspiracy rule. We are unpersuaded.

The rule's underpinnings are firm. The criminal law does not permit responsibility to be founded on mere association. Guilt "is not a matter of mass application," but "remains individual and personal, even as respects conspiracies." *Kotteakos v. United State*, 328 U.S. 750, 772, 66 S. Ct. 1239, 1251, 90 L.Ed. 1557 (1946). The necessary and proper query relates to an individual defendant's involvement. A conspiracy trial, therefore, must probe "what kind of agreement or understanding existed *as to each defendant*." *United States v. Borelli*, 336 F. 2d 376, 384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960, 85 S. Ct. 647, 13 L.Ed.2d 555 (1965). In this sense, RICO prosecutions are no exception. *See United States v. Sutherland*, 656 F. 2d 1181, 1189, 1194 (5th Cir. 1981), *cert. denied*, 455 U.S. 949, 102 S. Ct. 1451, 71 L.Ed.2d 663 (1982). Hence, the multiple conspiracy rule is generically applicable in the RICO environment. Moreover, the question of whether a single or multiple conspiracy exists is ordinarily one of fact. *Rivera-Santiago*,

872 F. 2d at 1079; *Drougas*, 748 F. 2d at 17. If, on the evidence adduced at trial, a reasonable jury could find more than one such illicit agreement, or could find an agreement different from the one charged, a multiple conspiracy instruction is proper and should be given if requested. *United States v. Dwyer*, 843 F. 2d 60, 6162 (1st Cir. 1988); *United States v. Erwin*, 793 F. 2d 656, 662 (5th Cir.), *cert. denied*, 479 U.S. 991, 107 S. Ct. 589, 93 L.Ed.2d 590 (1986).

[11,12] In this case, there were clearly multiple conspiracies: the indictment charged not only the omnibus RICO conspiracy involving all seven defendants, but six separate sub-conspiracies involving different groupings of defendants, *see supra* note 1. Recognizing as much, the district court purposed to cover the point in its instructions: "Should you find that any defendant participated in a conspiracy that was different from those charged in the indictment, that determination would be no basis for finding the defendant guilty of any of the offenses charged." Appellants complained that this reference suggested that the government was only precluded from proving conspiracies *outside* the scope of the indictment³ and could have misled the jurors into convicting a defendant on the RICO count so long as he was found to have entered into any of the charged sub-conspiracies, regardless of whether the omnibus RICO conspiracy, or the particular defendant's participation therein, was proven.

We decline appellants' invitation to treat this single admonition in a vacuum. Read as a whole, the jury instructions were sensitive to defendants' rights. The court impressed upon the jury that each element of each charged offense had to be found beyond a reasonable doubt as to each defendant before a guilty verdict could be returned against that defendant. At the very outset of its formal instructions,

³ Appellants requested the court to instruct that "[i]f you find any conspiracy charged did not exist then you must return a not guilty verdict as to that conspiracy even though you may find some other conspiracy, *whether charged or not*" (emphasis supplied).

the court asked the jury to "give separate consideration to each defendant and each charge," that is, to "consider each count and each defendant separately, considering the evidence as it bears against that defendant on that count in accordance with the instructions." The court repeatedly emphasized and reemphasized that the defendants were to be treated severally and individually in connection with each particular charge. As to the RICO conspiracy, the court framed the question as whether "the government carried its burden of proving each defendant guilty beyond a reasonable doubt of the charge listed," reminding the jury that the "essential elements are required to be proved beyond a reasonable doubt in order to establish the guilt of a particular defendant." And the jury was explicitly advised of its duty to determine whether the conspiracies existed "as charged."

Throughout the instructions, the court stressed that mere association or presence was insufficient to establish a given conspiracy. In instances too numerous to catalogue profitable here, the court made references to the defendants and the charges against them in singular form, focusing the jury's attention on "each defendant considered separately" according to "each charge." Time and again the court repeated that the government's burden was in no way lessened by the multiplicity of defendants and of charges. To say more would only paint the lily. We gauge each jury instruction in the context of the charge as a whole, not in isolation. See *United States v. Serino*, 835 F. 2d 924, 930 (1st Cir. 1987); *United States v. Cintolo*, 818 F. 2d 980, 1003 (1st Cir.) cert. denied, 484 U.S. 913, 108 S. Ct. 259, 98 L.Ed.2d 216 (1987); see also *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S. Ct. 396, 400, 38 L.Ed.2d 368 (1973). So viewed, we think the district court made it pellucid that only a conspiracy charged in a particular count of the indictment, and no other conspiracy, whether or not charged elsewhere in the bill, could properly bottom a conviction.

[13] A trial judge has no obligation to use the precise language that a defendant prefers. *Cintolo*, 818 F. 2d at 1004. Rather, "it is the judge's responsibility to ensure that the jury understands and appreciates the applicable law, and he is entitled to appreciable leeway in the manner of expression." *United States v. Nazzaro*, 889 F. 2d 1158, 1167 (1st Cir. 1989). We see nothing in the district court's aggregate instructions which could have confused the jurors, led them into error, or persuaded them to believe that a defendant should be found guilty of the RICO conspiracy — or any other charge for that matter — unless all essential elements of the particular offense had been proven. In the ensemble, the instructions provided ample safeguard that the conviction of one defendant on a particular charge would ensure neither the conviction of other defendants on that charge nor the conviction of the guilty defendant on any other count.

IV. JOINDER AND SEVERANCE

Before trial, each defendant unsuccessfully moved for severance under Fed.R.Crim.P. 8(b) and 14.⁴ They now argue that they were improperly joined in this single indictment and that the trial court abused its discretion in denying their motions to sever.

⁴ These rules provide in pertinent part:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed.R.Crim.P. 8(b).

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Fed.R.Crim.P. 14

A. Joinder.

[14] We begin with the unassailable: "The government is entitled to charge and join parties on the basis of what it reasonably anticipates proving against all." *United States v. Martinez*, 479 F. 2d 824, 828 (1st Cir. 1973). Nevertheless, mere similarity of acts, without more, does not justify joinder. *United States v. Talavera*, 668 F. 2d 625, 629 (1st Cir.), *cert. denied*, 456 U.S. 978, 102 S. Ct. 2245, 72 L.Ed.2d 853 (1982); *King v. United States*, 355 F. 2d 700, 703 (1st Cir. 1966). A rational basis in fact, sufficient to warrant joinder, must be discernible from the face of the indictment. *United States v. Arruda*, 715 F. 2d 671, 678 (1st Cir. 1983). In this fashion, Rule 8(b) codifies a balanced compromise between a defendant's right to have his guilt considered separately and the systemic benefits of consolidated trials. *See United States v. Luna*, 585 F. 2d 1, 4 (1st Cir.), *cert. denied*, 439 U.S. 852, 99 S. Ct. 160, 58 L.Ed. 2d 157 (1978); *Martinez*, 479 F. 2d at 828.

[15] We need not pursue too closely the type of affiliating circumstances generally required for joinder since we have squarely held joinder to be proper where, as here, a single RICO count "embrace[s] all of the acts and transactions upon which the other . . . counts [are] based." *United States v. Tashjian*, 660 F. 2d 829, 833 (1st Cir.), *cert. denied*, 454 U.S. 1102, 102 S. Ct. 681, 70 L.Ed.2d 646 (1981); *see also United States v. Davis*, 707 F. 2d 880, 883 (6th Cir. 1983). So long as there is a responsible basis for the averments, charging an omnibus RICO conspiracy normally supplies the glue necessary to bond multiple defendants together in a single proceeding where all are accused of participating in the conspiracy. *See United States v. Zannino*, 895 F. 2d 1 at 16 (1st Cir. 1990); *see also Arruda*, 715 F. 2d at 678 (similar; non-RICO conspiracy).

[16,17] This case exemplifies the general rule. The indictment charged each defendant with substantive RICO violations, wit joining the overall RICO conspiracy, and with

personally committing several predicate acts. The RICO charges embraced all the events upon which the other 56 counts were based. There was ample reason for shaping the indictment in this manner: similarities among the predicate acts — including their tight geographic and chronological setting and the coconspirators' common employment — suggested the existence of a joint criminal enterprise. The public benefit of a common trial was readily apparent. By and large, the racketeering acts and corresponding counts presented the requisite "sameness" to warrant joinder. Furthermore, the evidence presented at trial was ample to convict all defendants of the omnibus conspiracy. This is a good assurance that joinder was not a result of prosecutorial bad faith but was founded on a reasonable, good faith basis in fact. *See Arruda*, 715 F. 2d at 678; *Luna*, 585 F. 2d at 4. Even our admitted reservations about the UL counts, *see infra* Part V, weigh rather lightly in this balance. Decisions as to the propriety of joinder must be reviewed on the basis of what the prosecutor, exercising due diligence, knew (or sensibly believed) when the indictment was drawn. We think that, whatever conclusion, had grounds for a reasonable anticipation that the UL scheme could be wedded to the other racketeering acts. Stringing the counts together was proper.

B. Severance.

[18,19] Deciding whether to grant or deny a severance is a matter committed to the trial court's sound discretion; we will interfere with the exercise of that discretion only upon a demonstration of manifest abuse. *Arruda*, 715 F. 2d at 679; *Talavera*, 668 F. 2d at 630. When severance has been refused, the burden is on appellants "to make a strong showing of prejudice: in order to gain a new trial. *United States v. Porter*, 764 F. 2d 1, 12 (1st Cir. 1985) (listing cases); *see also United States v. Cresta*, 825 F. 2d 538, 544 (1st Cir. 1987), *cert. denied*, 486 U.S. 1042, 108 S. Ct. 2033, 100 L.Ed.2d 618 (1988); *Luna*, 585 F. 2d at 4; *United States v. Smolar*, 557 F. 2d 13, 21 (1st Cir.), *cert. denied*, 434 U.S. 866, 98 S. Ct.

203, 54 L.Ed.2d 143 (197). In this context “prejudice means more than just a better chance of acquittal at a separate trial.” *Martinez*, 479 F. 2d at 828. This is a difficult battle for a defendant to win. There is always some prejudice in any trial when more than one offense or offender are tried together — but such “garden variety” prejudice, in and of itself, will not suffice.” See *Cresta*, 825 F. 2d at 554-55; *United States v. Palow*, 777 F. 2d 52, 56 (1st Cir. 1985), *cert. denied*, 475 U.S. 1052, 106 S. Ct. 1277, 89 L.Ed.2d 585 (1986); *Tashjian*, 660 F. 2d at 834. Even where large amounts of testimony are irrelevant to one defendant, or where one defendant’s involvement in an overall agreement is far less than the involvement of others, we have been reluctant to secondguess severance denials. See, e.g., *Cresta*, 825 F. 2d at 554-55; *Arruda*, 715 F. 2d at 679; *Smolar*, 557 F. 2d at 21.

[20] In the present case, of course, the same considerations which authorize joinder militate in favor of overruling defendants’ Rule 14 claim. Moreover, we discern no unfair or unacceptable level of prejudice, that is, we see little beyond the type and degree of prejudice customary in virtually all high-profile trials of multiple defendants and charges. There is nothing to suggest that the number of defendants and charges was so large that the jury could not distinguish among them. See *Luna*, 585 F. 2d at 5. The discriminating verdict itself (as respects counts 28 and 40) evidenced that the jurors were able to, and did, follow the court’s instructions. See *Cresta*, 825 F. 2d at 554-55; *Tashjian*, 660 F. 2d at 834. Furthermore, as we describe more particularly *infra* Part V(B), the trial judge took effective measures to prevent any significant spillover from materializing. There were appropriate limiting instructions as to the admissibility of evidence against particular defendants and as to the need to determine guilt on an individual basis. All in all, this situation manifests the benefits of consolidated trials with no corresponding drawbacks sufficient to necessitate severance. See *Cresta*, 825 F. 2d at 555; *Arruda*, 715 F. 2d at 678-79. There was no misuse of the district court’s Rule 14 discretion.

V. VARIANCE

Appellants assert with considerable fervor that there were material variances between the conspiracies charged and proven. We are fully satisfied, for reasons implicit in what we have already written, that no variance existed among the several bar/restaurant/nightclub protection schemes, on the one hand, and the charged RICO conspiracy, on the second hand. The only doubtful area concerns whether the UL crimes (Series J) were properly within the scope of the master conspiracy; and if not, whether transferred guilt (or "spillover") attributable to them led the jury to convict on the RICO charges.

A. Was There A Variance?

[21] Our analytic roadmap is well drawn:

[A]n appellate court, reviewing the type of alleged variance . . . should ask the following questions. (1) Is the evidence sufficient to permit a jury to find the (express or tacit) agreement that the indictment charges? (2) If not, is it sufficient to permit a jury, under a proper set of instructions, to convict the defendant or a related similar conspiracy? (3) If so, does the variance affect the defendant's substantial rights or does the difference between the charged conspiracy and the conspiracy proved amount to "harmless error?"

Glenn, 828 F. 2d at 858; *see also United States v. Thomas*, 895 F. 2d 51, at 55-57 (1st Cir. 1990). In this case, the journey's first leg is humdrum; the evidence was unquestionably sufficient to permit a jury to find the RICO conspiracy. It was also sufficient, however, to permit the jury to find other, less encompassing conspiracies. Most pertinent for present purposes, we think that the UL crimes constituted a separate conspiracy and that the evidence did not allow a finding that they were within the master conspiracy's scope.

We start by stating the obvious: the UL plot, on its face, seems a breed apart from the other racketeering allegations mentioned in the indictment. For one thing, the illegal activity defrauding a business by trick — was dissimilar in nature and kind to that involved in the bar/restaurant/nightclub schemes. The method of operation was foreign to the other schemes; rather than being accomplished through a series of consensual payments resulting from extortion or improper favors, Series J involved the procurement of money through mail fraud, forgery, and misrepresentation. Such methodologic differences are important. *See, e.g., Rivera-Santiago*, 872 F. 2d at 1079; *Drougas*, 748 F. 2d at 17. The target was also dissimilar; UL, a wholesaler and importer, was not the operator of licensed premises open to the paying public. It was therefore not subject to the sort of street-level oversight and regulatory control that made the other businesses so vulnerable to corrupt enforcement and undeserved preferences. Preying upon UL required a different tack. This uniqueness had another relevant aspect: unlike the bar/restaurant/nightclub schemes, which fed upon one another, it seems doubtful that the UL “venture could have helped the [other] venture[s], or vice versa.” *See Glenn*, 828 F. 2d at 859. Then, too, the billboard caper was much more tightly circumscribed, known by far fewer defendants, and bereft of the interconnections so prevalent among the other series of racketeering acts. Only Nave and Sheehan were directly involved. There is precious little evidence to suggest that any of the other defendants approved of, joined, or shared Nave’s and Sheehan’s efforts to conduct BPD affairs through mail fraud.⁵ Put bluntly, too few of the common threads which ran through the fabric of the other racketeering acts ensnarled the UL affair.

⁵ There was evidence that Boylan participated in the scheme to the extent of endorsing one check. Moreover, there was arguably an indirect connection in that UL paid for Sheehan’s meals at Cafe Budapest, which was a “client” of Connolly’s. In context, these trimtrams prove little of consequence.

To be sure, criminal conspiracies come in a wide variety of sizes, shapes, and styles. Yet, a prosecutor cannot string disparate incidents together by strands of suppositions and surmise and expect the tie to bind. In this instance, the government argues that all the defendants, in Series J and beyond, used their official positions illegally to gain things of value. That is so but it cannot be enough. There must be more of a nexus than rough temporal and geographic identity and affiliation with the same governmental unit. Were the government's generality legally sufficient, the prosecution could enfold within the RICO conspiracy every other BPD officer who, for example, may have accepted gratuities for voiding parking tickets in District 4 during the same time frame. We cannot accept that the law would allow painting with so broad a brush, conglomerating a bewildering array of markedly dissimilar criminal acts as part of a single RICO conspiracy on so tenuous a connection as has been demonstrated here. The UL affair did not belong within the confines of the omnibus RICO conspiracy. To this extent, a variance existed.

B. Was There Prejudice?

[22,23] At the bottom line, the finding that the UL scheme constituted a variance does not profit the appellants: we conclude that the variance did not impart any defendant's substantial rights and, thus, can be dismissed as harmless.⁶ Variance requires reversal only where defendants demonstrate that the difference in proof somehow affected their "substantial rights" so that they were "significantly prejudiced." *Glenn*, 828 F. 2d at 85960; *see also Thomas*, 895 F. 2d at 5657; *Drougas*, 748 F. 2d at 17; *Flaherty*, 668 F. 2d at 582. In this instance, Nave and Sheehan were found guilty of

⁶ Because the predicate crimes involved in the sundry bar/restaurant/nightclubs sub-conspiracies could warrantably be found to fit within the scope of the omnibus RICO conspiracy, and because the district court instructed the jury adequately on the multiple conspiracy rule, *see supra*, Part III(B), we need only consider prejudice stemming from the UL variance.

other non-UL-related offenses simultaneously charged as predicate acts,⁷ so there is no chance that they were found guilty of the RICO conspiracy solely on the basis of their involvement with UL. Moreover, by acquitting Nave and convicting Sheehan on count 40, and acquitting both on count 28, the jury showed its ability to discriminate between the individual defendants and among the charged offenses, thereby blunting any accusation of harmful spillover.

Slightly more troubling is the defendants' united protest that prejudice inured because UL evidence, admitted without limitation, tainted the jury's perception of the case. The defense premise is sound in the abstract: courts must be vigilant in guarding against transference of guilt from evidence incriminating a defendant involved in one conspiracy to other defendants involved in a different conspiracy. See *United States v. Levine*, 569 F. 2d 1175, 1177 (1st Cir. 1978). We agree wholeheartedly that spillover effects from a variance, if substantially deleterious, may demand reversal in an appropriate case. *Flaherty*, 668 F. 2d at 582. In this case, however, the spillover caused no legally significant harm.

Inasmuch as joinder of the Series J counts with the remainder of the charges was proper, see *supra* Part IV(A), and because the district court carefully charged the jury to treat each count separately, Nave and Sheehan are hard pressed to complain about this kind of spillover. The other defendants' claims of prejudice rest on an even more ephemeral postulate: because the UL scheme was so repugnant and the government's proof of it so incontrovertible, these appellants say, they were prejudiced by the admission of the evidence (even though it did not refer directly to them). The

⁷ The Appendix details the specific charges. To recapitulate briefly, we mention here only that Nave was paid money on numerous occasions by McGowan; Sheehan received improper payments from Chaletzky; and both of them accepted gratuities from Tasse and the Blacks.

argument is vapid. The UL affair stemmed from nonperformance of a security detail which, if handled through official channels, could appropriately have been commissioned. The bar protection schemes involved thinly veiled threats endangering the continuing enterprises and livelihoods and also involved conduct impermissible under any circumstances. The latter were amply proven and seem far more reprehensible. Evidence of payroll-padding would not appear, realistically, to add much fuel to so torrid a fire.

The sockdolager is that the trial court's instructions provided ample prophylaxis. Notwithstanding the number of defendants, the evidence was presented in a well-structured, compartmentalized fashion that minimized the risk of spillover to particular defendants from evidence directed at others.⁸ At every turn, the trial judge reminded the jury to treat each defendant and each charge separately. In these ways, the chance for harm remote and speculative to begin with — was further reduced. The court's precautions supply considerable assurance that no unfair prejudice resulted from the variance. We see no basis for ordering a new trial.

VI. CONTINUITY

Appellants assign error to the trial court's failure, during jury instructions, specifically to mention "continuity" as an element of proving racketeering activity. Alternatively, they urge that even if the court's instructions were adequate the evidence failed to demonstrate the requisite continuity between the alleged predicate acts.

⁸ Indeed, one of the defendants' principal arguments is that the prejudice which they perceive was heightened because 28 of the first 29 trial witnesses dealt only with the UL affair. Although we think the lament is baseless, the circumstances illustrate the sort of tight compartmentalization which the district judge demanded throughout the trial.

A. Instructional Error: Continuity.

[24] The Criminal Rules furnish our point of embarkation: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto . . . stating distinctly the matter to which that party objects and the grounds for the objection." Fed.R.Crim.P. 30. Parties must "clearly object," *Glenn*, 828 F. 2d at 862, and their objections must be phrased with sufficient particularity to alert the trial court to the grounds asserted, *United States v. Kaplan*, 832 F. 2d 676, 682 (1st Cir. 1987); *cert. denied*, 485 U.S. 907, 108 S. Ct. 1080, 99 L.Ed.2d 239 (1988); *United States v. Harrigan*, 586 F. 2d 860, 864 (1st Cir. 1978).

[25] Appellants say they properly preserved continuity as a ground of appeal anent the charge. The record belies the claim. In the trial court, appellants' objections were aimed not at the requirement of continuity, but at the supposed need to prove multiple schemes as a prerequisite to mounting a RICO prosecution (an idea now thoroughly discredited).⁹ Typical is the objection lodged during the post-charge bench conference:

I think that you only gave half of the pattern instruction. I think the other half is that if the racketeering acts are too closely related together, that they may be subparts of the same transaction and not separate racketeering acts. And I think the evidence has to show multiple episodes of racketeering activity and not merely repeated acts that carry out the same criminal conduct. . . .

⁹ In *H.J. Inc. v. Northwestern Bell Telephone Company*, _____ U.S. _____, 109 S. Ct. 2893, 2901, 106 L.Ed.2d 195 (1989), decided after completion of defendants' trial, the Court firmly rejected the notion that a single illegal scheme, even if conducted by multiple predicate acts, could never be enough, by itself, to make out a pattern of racketeering activity.

This objection, fairly viewed, directed the court's attention away from, instead of toward continuity. Litigants cannot expect a judge, particularly at the tail end of a long and complex trial, to be clairvoyant. "[R]obes and gavels are the tools of a jurist's trade — not tea leaves or crystal balls." *United States v. Ladd*, 885 F. 2d 954, 961 (1st Cir. 1989). Because no defendant pointed the district court toward the issue in a manner which could reasonably be expected to have alerted the judge to the instructional error hawked on appeal, we review the charge only for "plain error." *United States v. Griffin*, 818 F. 2d 97, 100 (1st Cir.), *cert. denied*, 484 U.S. 844, 108 S. Ct. 137, 98 L.Ed.2d 94 (1987).

[26] The plain error hurdle is high. *See, e.g., United States v. Hunnewell*, 891 f. 2d 955 at 956-57 (1st Cir. 1989) (reviewing Supreme Court case law). The doctrine does not allow litigants to be relieved from "ordinary backfires . . . which may mar a trial record." *Griffin*, 818 F. 2d at 100. In applying plain error jurisprudence to the judge's charge, "the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *United States v. Thomann*, 609 F. 2d 560, 565 (1st Cir. 1979) (quoting *Cupp v. Naughten*, 414 U.S. at 147, 94 S. Ct. at 400). Appellants' claim succumbs when measured against so rigorous a standard. We explain briefly.

[27] The language of RICO itself makes explicit the requirement of "a pattern of racketeering activity." 18 U.S.C. Section 1962(c). RICO's use of the word "pattern" is to be taken in its "ordinary meaning," that is, the predicate acts must "fall into an [] arrangement or order." *H.J. Inc. v. Northwestern Bell Telephone Company*, _____ U.S. _____, 109 S. Ct. 2893, 2900, 106 L.Ed.2d 195 (1989). Such a pattern "requires at least two acts of racketeering activity." 18 U.S.C. Section 1961(5). This language means that something more than proof of two predicate acts is needed to prove that

a pattern took shape. See, *H.J. Inc.*, 109 S. Ct. at 2900; *Sedima, S.P.R.L. v. Imrex*, 3285 n. 14, 87 L.Ed.2d 346 (1985); *Fleet Credit Corp. v. Sion*, 893 F. 2d 441 at 444 (1st Cir. 1990); *Roeder v. Alpha Indus. Inc.*, 814 F. 2d 22, 30 (1st Cir. 1987). The nature of the "more", however, remains somewhat obscure.

In the absence of any pat formula, the Court has instructed us to use a flexible approach toward the pattern requirement "deriv[ing] from a common-sense, everyday understanding of RICO's language and Congress' gloss on it." *H.J. Inc.*, 109 S. Ct. at 2901. The Court itself has focused on "relatedness" and "continuity" as useful tools in proving a pattern of racketeering activity. *Id.*, at 2900. It is, therefore, "continuity plus relationship which combines to produce a pattern." *Sedima*, 473 U.S. at 496 n. 14, 105 S.Ct. at 3285 n. 14 (quoting S.Rep. No. 91-617 (1969)); see also *Fleet Credit*, at 444. It follows, of course, that continuity is not an element of a RICO offense, *stricto sensu*, but is nevertheless a necessary characteristic of the evidence used to prove the existence of a pattern.

[28] Continuity may be demonstrated "in a variety of ways." *H.J. Inc.*, 109 S. Ct. at 2901. In practice, proof of continuity may overlap with proof of relatedness, *Id.*, at 2900, but such an imbrication is not inevitable. Continuity — which can be defined as a showing that the racketeering predicates "amount to or pose a threat of continued criminal activity," *Id.* — may be established "by proving a series of related predicates extending over a substantial period of time" or by proving that "the predicates are a regular way of . . . conducting or participating in an ongoing and legitimate RICO 'enterprise,'" *Id.*, at 2902, or by proving that the predicates form a "closed period of repeated conduct," *Id.* In any event, it is by now clear that temporality lies at the core of continuity. *Id.*; see also *Fleet Credit*, at 447 (allegation of fraudulent mailings over 4-year period satisfies continuity requirement).

Defendants are correct that the court below omitted the specific word "continuity" from its jury instructions. But the word itself should not be accorded talismanic significance. Despite the expurgation, the substance of the point was covered. To cite one specific example, the court stated"

[A]t least two racketeering acts are necessary . . . , but proof of two separate racketeering acts does not necessarily constitute a pattern of racketeering activity. Proof of two is necessary, but that proof alone is not sufficient. Two of something does not constitute a pattern by itself. The two acts must be connected in some way. Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not separated, isolated events You may find that two or more acts are part of a pattern, that even though they are different from each other, they are related to the affairs of the enterprise . . . in such a way as to form a pattern of racketeering activity. Again, just finding two acts were committed is not enough. They must be in a pattern. They must form a pattern.

This instruction unarguably apprised the jury of the pattern requirement. At best, then, appellants' point reduces to a claim that the court misguggled the charge by failing satisfactorily to define this element of the offense. The claim will not wash.

The charge stressed that "something more" than two acts was necessary to prove a racketeering pattern and evoked that "something more" in commonsense terms consonant with the Court's teachings. The instruction succinctly recited types of "distinguishing characteristics" on which the jury could rely to show the requisite interrelationship. *Cf. Fleet Credit*, at 446. The characteristics mentioned by the lower court adequately evinced the concept that continuity requires

“a series of related predicates extending over a substantial period of time,” reflective of a “regular way” of conducting the enterprise’s affairs. See *H.J. Inc.*, 109 S. Ct. at 2902; see also *Fleet Credit*, at 446. Whether or not erroneous in the strictest sense, we are confident that any shortcomings in the charge did not affect defendants’ substantial rights.

Other courts have held far less elaborate instructions on “pattern” — instructions which also omitted specific reference to “continuity” — are sturdy enough to withstand plain error review. See e.g., *United States v. Muskovsky*, 863 F. 2d 1319, 1328-29 (7th Cir. 1988), *cert. denied*, _____ U.S. _____, 109 S. Ct. 1345, 103 L.Ed.2d 813 (1989); *United States v. Grayson*, 795 F. 2d 278, 288-90 (3d Cir. 1986), *cert. denied*, 479 U.S. 1054, 107 S. Ct. 927, 93 L.Ed.2d 978 (1987).¹⁰ We explain *infra* that, in this case as in *Muskovsky*, there could be no plain error because “the jury’s finding of guilt on all of the predicate . . . counts . . . necessarily established the requisite continuity and relationship.” 863 F. 2d at 1329. In this case, as in *Grayson*, “the evidence was such that a jury finding [defendant] guilty of a RICO violation could only have relied upon predicate acts having the necessary interrelatedness.” 795 F. 2d at 290. In both *Muskovsky*, 863 F. 2d at 1329, and *Grayson*, 795 F. 2d at 290, as here, the lengthy time frame over which the predicate acts occurred, their common location, the similarities in the alleged conduct, the number of separate sub-schemes, the overlapping roles of the individuals involved, and their coordinated actions, combine to indicate that the required “continuity

¹⁰ Although both *Muskovsky* and *Grayson* antedated *H.J. Inc.*, there is not the slightest reason to believe that a shadow has been cast over them. The issue resolved in *H.J. Inc.*, whether multiple schemes must be proved to show the requisite pattern of racketeering activity, is distinct from the broader question of what the evidence must ultimately demonstrate as to relatedness and continuity. Placed in perspective, *H.J. Inc.*, in no way beclouds *Muskovsky*, *Grayson*, or the jury instructions disputed here.

plus" was shown. See, e.g., *Fleet Credit*, at 445-447. There was no plain error.

B. Proof of a Pattern.

[29] Appellants' argument that the evidence was insufficient to prove a pattern of racketeering activity need not occupy us for long. As in *Muskovsky* and *Grayson*, the requisite continuity is manifest among the predicate acts on which the jury must have relied to convict under RICO. The evidence demonstrates beyond peradventure that the racketeering acts were not isolated events. The jury concluded, supportably, that each defendant used his official position to profit through Hobbs Act offenses. These activities continued over lengthy periods of time (no less than a year in any instance and for as long as six years in certain instances). The number of acts and the presence of numerous subschemes lend great weight in the balance. See *Fleet Credit*, at 446. As to relatedness, the similarities among the predicate acts were obvious and do not bear repeating. In fine, the collocation of so many common characteristics along so lengthy a temporal span belied appellants' denials that these actions were not a regular way of conducting their BPD business.

[30] We have often acknowledged that, in a criminal trial, the factfinder "is free to choose among various reasonable constructions of the evidence." *United States v. Thornley*, 707 F. 2d 622, 625 (1st Cir. 1983) (per curiam). The proof need not rule out reasonable alternative hypotheses of innocence so long as the record, *in toto*, viewed favorably to the government, substantiates a finding of guilt. See *United States v. McHugh*, 769 F. 2d 860, 867 (1st Cir. 1985). Based on the mass of assembled evidence in this case, the jury could certainly have found that defendants, as a group, participated in "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 109 S. Ct. at 2902, and that defendants' serial schemes embraced "criminal acts that have the same or similar purposes, results, participants, victims, [and]

methods of commission," *Id.* at 2901. There was enough evidence of a "pattern" to support the convictions.

VII. THE HOBBS ACT

Appellants fire several rounds of grapeshot at their Hobbs Act convictions. All have to do with perceived deficiencies in the lower court's instructions. Only two salvos warrant discussion.

A. Inducement

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, or under color of official right." 18 U.S.C. Section 1951(b)(2). The courts of appeals are divided on the precise interpretations of this language. Penologically, the dispute centers upon whether the Hobbs Act preserves the distinction between bribery and extortion. Linguistically, the dispute centers upon the effect of the disjunctive immediately preceding the words "under color of official right." Some courts have decided that, given grammar and syntax, the "under color" phrase modifies the verb "induced," thus requiring the prosecution to show that a defendant not only acted "under color of official right" but also that he induced payment by some form of Hobbs Act extortion. *See United States v. Aguon*, 851 F. 2d 1158, 1162-63 (9th Cir. 1988) (en banc); *United States v. O'Grady*, 742 F. 2d 682, 694 (2d Cir. 1984) (en banc). Other courts have rejected this interpretation, ruling that inducement is not required if Hobbs Act extortion occurs "under color of official right." *See e.g., United States v. Holzer*, 816 F. 2d 304, 311 (7th Cir. 1987), *cert. denied*, 484 U.S. 1076, 108 S Ct. 1054, 98 L.Ed.2d 1016 (1988); *United States v. Spitler*, 800 F. 2d 1267, 1274-75 (4th Cir. 1986); *United States v. Swift*, 732 F. 2d 878, 880 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158,

105 S. Ct. 905, 83 L.Ed.2d 920 (1985); *United States v. Jannotti*, 673 F. 2d 578, 595 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106, 102 S. Ct. 2906, 73 L.Ed.2d 1315 (1982).

In the past, we have successfully avoided this issue,¹¹ *see United States v. Jarabek*, 726 F. 2d 889, 904 n. 16 (1st Cir. 1984); *see also United States v. Hathaway*, 534 F. 2d 386, 394 (1st Cir.), *cert. denied*, 429 U.S. 819, 97 S. Ct. 64, 50 L.Ed.2d 79 (1976), and do so again. We enjoy this luxury because the trial court's instructions in this case required the jury to find, as a condition precedent to guilt, that defendants induced the payments. In the court's words: "If there is no inducement, there is no crime." The court made numerous other statements to the effect that inducement was necessary to convict under the Hobbs Acts. It also explained:

Inducement can take many forms, some more subtle than others, and any inducement is sufficient. . . . The mere passive receipt of a gift is not extortion. The government is not required to prove that the defendant demanded or directly solicited the payment made or that he offered anything specific in return for it.

The instruction continued at length, describing ways in which the government might prove inducement. Inasmuch as the court's charge tracked the language used by those circuits which impose an inducement requirement, *see e.g., Aguon*, 851 F. 2d at 1166 ("inducement' can be in the over fort of a

¹¹ In *United States v. Bucci*, 839 F. 2d 825 (1st Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 117, 102 L.Ed.2d 91 (1988), we stated that the government could prove extortion "by showing that a defendant induced payment *either* through the use of actual or threatened force, violence, or fear, *or* under color of official right." *Id.*, at 827; *see also United States v. Rivera-Medina*, 845 F. 2d 12, 14 (1st Cir.) (same), *cert. denied*, _____ U.S. _____, 109 S. Ct. 160, 102 L.Ed.2d 131 (1988). Neither case decided whether inducement was a necessary element of extortion "under color of official right"; the quoted language was intended only to clarify that the government need not show extortion *both* through fear of economic loss *and* under color of official right.

'demand,' or in a more subtle form"); *O'Grady*, 742 F. 2d at 691 ("inducement can take many forms, some more subtle than others"); *Id.*, at 693 (prosecution must show defendant "did something" to induce payment), appellants have obtained the benefit of the rule in its most liberal permutation. Because the charge passed muster on any view of the statutory language, appellants' rights were amply protected.¹²

B. Mens Rea.

Defendants claim that the district court's instruction on specific intent was inappropriate. Near the beginning of the charge, the judge stated:

The term "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident. The word "willfully" means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. These instructions will apply to these terms throughout the remainder of these instructions.

Thereafter, in enumerating the elements of Hobbs Act offenses, the court twice stated that the government had to

¹² We briefly mention two related sniper shots. First, appellants' complaint that the district court "confused the issue" by other statements in the charge exhibits greater imagination than logic. Although instructing separately on fear of economic loss (a practice consistent with *Bucci*, 839 F. 2d at 827), the court did not retreat from its admonition that inducement was required on an "under color" claim. Second, the argument that the court's instructions were infected by the same viral strain which led to reversal in *O'Grady* seems altogether misplaced. The district court's instructions in *O'Grady* focused on inducement arising out of the naked fact of the officeholding, without more. 742 F. 2d at 688, 693. Here, unlike *O'Grady*, the inducement instruction was appropriately focused on defendants' actions while holding office.

prove that “defendant willfully and knowingly obtained property from the person.”

[31,32] No matter what type of extortion is alleged, specific intent is part and parcel of a Hobbs Act conviction. *See, e.g., Aguon*, 851 F. 2d at 1168 (extortion under color of official right); *United States v. Haimowitz*, 725 F. 2d 1561, 1572 (11th Cir.) (extortion through fear of economic loss), *cert. denied*, 469 U.S. 1072, 105 S. Ct. 563, 88 L.Ed.2d 504 (1984); *see also United States v. Sturm*, 870 F. 2d 769, 777 (1st Cir. 1989). IN our opinion, the definitions employed by the court below adequately conveyed the essence of the *mens rea* requirement for Hobbs Act extortion. *Compare, e.g., Aguon*, 851 F. 2d at 1168; *United States v. Kattar*, 840 F. 2d 118, 124 n. 4 (1st Cir. 1988); *United States v. Dozier*, 672 F. 2d 531, 542 (5th Cir.), *cert. denied*, 459 U.S. 943, 103 S. Ct. 256, 74 L.Ed.2d 200 (1982); *United States v. Scacchetti*, 668 F. 2d 643, 649 (2d Cir.), *cert. denied*, 457 U.S. 1132, 102 S. Ct. 2957, 73 L.Ed.2d 1349 (1982); *cf. Sturm*, 870 F. 2d at 775 (rejecting “purely objective” definitions which contained “no reference to the defendant’s state of mind”). Furthermore, the charge as a whole made it plain that the definitions applied across the board. There was no error.¹³

[33] Appellants also denigrate the instruction on “under color” extortion from another standpoint. The charge suggested, appellants say, that a conviction could be based on a defendant’s knowledge that the victim was motivated by the public office held rather than by some misuse of that office. But, this hairsplitting incorrectly shifts the *mens rea* focus to fine — and wholly needless distinctions — concerning what a

¹³ Appellants’ argument that the court failed properly to instruct on conspiracy to commit extortion fails for much the same reasons. Although the instructions anent this specific crime did not explicitly elucidate the *mens rea* element, that portion of the charge was prefaced with the statement that the courts “earlier instruction as to conspiracy applies.” Inasmuch as that earlier instruction dealt adequately with specific intent, no more was exigible.

defendant might think that a payor might be thinking. In extortion, "[t]he emphasis is on the defendant's own motives rather than on his perceptions of a potential contributor's motive." *Dozier*, 672 F. 2d at 542. Telepathy aside, the crux of the matter is whether the official accepts the gratuity knowing that payment is being tendered because of his public office. In order to convict in an "under color" case, it is unnecessary to draw distinctions between payors who are galvanized by defendant's public office and those who are galvanized by some overt misuse of that office. *See, e.g., Spitler*, 800 F. 2d at 1274-75; *United States v. Blackwood*, 768 F. 2d 131, 137 (7th Cir.), *cert. denied*, 474 U.S. 1020, 106 S. Ct. 569, 88 L.Ed.2d 554 (1985); *United States v. Butler*, 618 F. 2d 411, 418 (6th Cir.), *cert. denied*, 447 U.S. 927, 100 S. Ct. 3024, 65 L.Ed.2d 1121 (1980); *cf. United States v. McKenna*, 889 F. 2d 1168, 1174 (1st Cir. 1989) ("under color" language includes threats inherent in public office).

[34] IN a last gasp, as if the third time were the charm, appellants press a final *mens rea* objection. On the topic of extortion by fear of economic harm, the district court charged that "the exploitation of the payor's reasonable fear constituted extortion whether or not the defendant was responsible for creating that fear and despite the absence of any direct threats." Appellants speculate that the remark could have allowed the jury to convict them without proof that they were aware of, or intended to, take advantage of, the victim's fear. But, this bit of unmitigated conjecture improperly wrests the court's comment from its contextual moorings. *See McKenna* 889 F. 2d at 1173 (reviewing instructions "in light of the whole charge and the whole trial, not singularly").

The disputed statement was made in a section of the instructions defining (and distinguishing) various types of Hobbs Act extortion. The court's emphasis was on the source of the fear which was being exploited, not on exploitation itself. Nothing in this preachment, or elsewhere in the charge, negated the need for the prosecution to prove intent to

exploit. In addition, the court told the jurors that (1) conviction would have to be based on exploitation of the payor's fear, and (2) a defendant must have "wrongfully used" that fear to induce the payor's consent. These instructions plainly implies that unintentional conduct would not suffice. *See Scacchetti*, 668 F. 2d at 649 ("Use of power 'to obtain money' clearly refers to the purpose of the defendant."). Given the setting in which the challenged comment occurred and the court's general instruction that *any* Hobbs Act violation must entail willful and knowing conduct, we see no infirmity.

VIII. CROSS-EXAMINATION

Before the grand jury, the Blacke brothers admitted bribing Jon Straight, a Board member, by means of cash gifts and procurement of male prostitutes. The Blackes' testimony was obtained through grants of immunity covering myriad prosecutable offenses, including their not-so-straight arrangements with Straight. The trial judge allowed inquiry into the bribery, but not into the recruitment of prostitutes or George Blacke's sexual orientation. Appellants assert that the limits placed on cross-examination abridged their sixth amendment rights and comprised an abuse of the district court's power. In expounding the point, they say that the restrictions prevented the jury from learning the full sweep of the immunity conferred; that the unedited story was relevant to show that the Blackes were veteran bribe-givers rather than hapless victims of extortion; and that the defense's efforts to shatter the Blackes' credibility were hamstrung.

[35,36] The right to cross-examine adverse witnesses is constitutionally guaranteed. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). The guarantee extends to the elicitation of information about the immunity granted to a witness in exchange for his testimony. *United States v. Barrett*, 766 F. 2d 609, 614 (1st Cir.), cert. denied, 474 U.S. 923, 106 S. Ct. 258, 88 L.Ed.2d 264 (1985). Nevertheless, the right to cross-examine is not unfettered. *See*

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *United States v. Chaudhry*, 850 F. 2d 851, 856 (1st Cir. 1988). Defendants cannot run roughshod, doing precisely as they please simply because cross-examination is underway. So long as a reasonably complete picture of the witness' veracity, bias, and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries. See *Garcia-Rosa*, 876 F. 2d at 237; *Griffin*, 818 F. 2d at 101. Indeed, the judge has a responsibility to do so.

[37] To show a constitutional violation, a defendant must demonstrate that he was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Van Arsdall*, 475 U.S. at 680, 106 S. Ct. at 1436. Short of a constitutional infringement, appellate courts will grant relief from the shackling of cross-examination only for manifest abuse of discretion. *Rivera-Santiago*, 872 f. 2d at 1084. Having carefully combed the record, we discern no valid cause for complaint.

[38] Many of the bars involved in this case catered primarily, or at least frequently, to homosexual persons. Some of the witnesses shared that persuasion. Both before and during trial, the court expressed a desire not to becloud the charges by trying the case "in a homosexual sense." After warning the defense counsel away from the topic during opening statements, the judge consistently blocked questions aimed at bringing the matter of sexual orientation to the

forefront.¹⁴ Given the marginal value of sexual preference testimony and its potential to distract the jury from the legitimate issues in the case, we think that the court's plan was a wise and proper exercise of its authority.

What is most important, the circumscription created no cognizable unfairness. The court never prohibited defendants from asking about the money given to Straight or the fact that he was bribed on several occasions. Straight's venality, the Blackes' corrupt intentions, and other material aspects of the relationship between the Blackes and the Board member were fully explored. Only the sex related trimmings were placed off limits. In the court's words: "Male prostitution, homosexuality, personal sexual inclination, no. Inquiry about a relationship or established relationship with Jon Straight which allowed him to use Jon Straight to influence actions on the Board to benefit himself, yes." And in the end, the cross-examination of both George and Lawrence Blacke proved thorough, probing, and wide-ranging. They were questioned intensively and extensively about their understanding of the immunity orders. George Blacke was asked about much of the

¹⁴ To cite one resounding example, the district court struck a question propounded by Sheehan's attorney which assumed, and referred to, a witness' "homosexual preference for young men." The court declared at the sidebar:

Well, let's get this out of the way right here and now and hear me and hear me good. What does homosexual preference have to do with credibility? . . . I will tell you now and I will tell you once . . . I will take action against you if you bring this witness' homosexual preference before this jury again. The reason I say that is obvious. Everybody in this room knows that mentioning homosexuality, accusing someone of homosexuality has such a proclivity, such a tendency to debase and humiliate a witness. . . . It has nothing to do with testimonial honesty. It has nothing whatsoever to do with it. So you will not and neither will any other . . . counsel in this case refer to the witness' sexual preference. . . . In my judgment [the question] was offered for purpose of humiliating and degrading the witness. . . . It's not worth a hill of beans, compared to the probative value it offers. It has absolutely no value in this case. . . .

activity for which he was given immunity, including cocaine use. Lawrence was queried about payments for police details, alleged cocaine purchases, and schemes to bribe officials.

This cross-questioning was constitutionally sufficient. The Blackes' understanding of their immunity, the numerous crimes which were shielded, and the bribery itself were the essential factors shedding light on the witnesses' testimonial incentives and veracity. All were covered in excruciating detail. The jury heard more than enough to form a complete and accurate picture of the breadth of the immunity, the Blackes' potential motivations, and their likely prejudices. The defense was allowed to "fully establish[] the potential bias" of the witnesses. *barrett*, 766 F. 2d at 514. Here, as in *United States v. Tracey*, 675 F. 2d 433, 439 (1st Cir. 1982), "the jury was in possession of evidence sufficient to permit it to make a discriminating appraisal of [the witnesses'] motives to testify." The confrontation clause requires no more.

It is equally clear that the judge did not abuse his discretion. In the context of the picture which defense counsel were allowed to paint, the incremental probative value of presenting evidence anent George Blacke's sexual orientation was zero; the incremental value of the evidence as to male prostitutes was either slim or none. The evidence had a far greater potential to obscure than to enlighten. Bearing in mind the wide latitude afforded trial judges under Fed.R.Evid. 403, see e.g. *United States v. Zannino*, 895 f. 2d 1, at 16 (1st Cir. 1990); *Tierney*, 760 F. 2d at 387-88, the district court's conclusion that the inflammatory and prejudicial effects of the forbidden subjects substantially outweighed any relevance or probative effect is not open to serious question. The limitations placed on cross-examination appear altogether appropriate.

IX. THE PERSONNEL FILES

[39] At trial, the district court permitted the prosecution to introduce "personnel orders" taken from BPD files.

These documents contained historical information about defendants' placements within the department, *e.g.*, promotions, status changes, reassignments. The personnel orders were part of regularly maintained personnel files. The files also held documents relating, *inter alia*, to commendations, suspensions, punishments, outside studies, and the like. Appellants claim that the court's refusal to let them introduce the unexpurgated files constituted prejudicial error. We examine their contention.

The court initially rejected defendants' proffer as nonpertinent character evidence. *See* Fed.R.Evid. 404(a)(1). Defendants argue that the ruling took too myopic a view; they claim that the excluded documents were relevant to allow a balanced portrayal of their overall relationship, good and bad, to the enterprise. The inquiry presented in a RICO trial, however, focuses not on the contours of the relationship between defendants and enterprise (contours largely undisputed here), but on the relationship of the predicate acts to each other and to the enterprise. *See Yellow Bus Lines, Inc. v. Local Union* 639, 839 F. 2d 782, 792-94 (D.C. Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 309, 102 L.Ed.2d 328 (1988); *see also United States v. Welch*, 656 F. 2d 1039, 1060-62 (5th Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S. Ct. 1767, 72 L.Ed.2d 173 (1982); *United States v. Scotto*, 641 F. 2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961, 101 S. Ct. 3109, 69 L.Ed.2d 971 (1981). Placed in proper perspective, then, defendants' lament collapses of its own weight. Evidence of their hard work and dedication would be no more than marginally relevant to any disputed issue in this case. Bearing in mind the leeway that a trial judge possesses in admitting or excluding evidence on grounds of relevance, *see tierney*, 760 F. 2d at 387-88; *Drougas*, 748 F. 2d at 24, exclusion of the evidence cannot productively be assigned as error.

[40] Next, appellants claim that a misleading impression was created by presenting the personnel orders and not the remainder of the files. This claim hinges on Fed.R.Evid.

106, a stricture which protects litigants from the twin pitfalls of creative excerpting and manipulative timing.¹⁵ "The rule is based on two considerations. the first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial." Fed.R.Evid. 106, reporter's notes; *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S. Ct. 439, 451 n. 14, 102 L.Ed.2d 445 (1988). here, the court did not merely delay admission of the remainder of the files, but scrapped them altogether. Accordingly, our concern lies with the first of the considerations undergirding the rule.

It is perfectly clear that the threshold question under Rule 106 is always one of defining entirety: that is, if Rule 106 applies, *what* is it that must be complete? Because the doctrine of completeness embodied in Rule 106 neither mandates nor delineates a particular strata of entirety, but instead looks to "fairness" to determine which things should be "considered contemporaneously with" each other, we believe that a practical, commonsense approach must be taken in answering the definitional question. The result, essentially, becomes a lone-drawing exercise, to be conducted case by case. Inasmuch as each document, or set of documents, tends to be *sui generis*, is a mechanical taxonomy seems unworkable.

Typically, it is easy to frame the dimensions of the entirety. The usual problem concerns an excerpt from a single document which neglects some revealing context of the whole. *See e.g., United States v. Poschwatta*, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064, 108 S. Ct. 1024, 98 L.Ed.2d 989 (1988). That is not our case. The personnel orders were not complete in and of themselves. We see no valid basis for a per se rule that all documents contained in

¹⁵ The text reads: When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. Fed.R.Evid. 106.

agglomerated files must be admitted into evidence merely because they happen to be physically stored in the same folder. Cf. e.g., *United States v. Smith*, 794 F. 2d 1333, 1335 (8th Cir.) (additions must be explanatory and relevant to admitted portions), *cert. denied*, 479 U.S. 938, 107 S. Ct. 419, 93 L.Ed.2d 370 (1986); *United States v. Marin*, 669 F. 2d 73, 84 (2d Cir. 1982) (similar); *United States v. Walker*, 652 F. 2d 708, 710 (7th Cir. 1981) (similar). Rather, in determining the admissibility of various units contained in document collections, a preliminary decision must be made as to what grouping constitutes a fair and reasonably complete unit of material. In some cases, that unit may be a single document; in others, all the documents, or in a third class, some subpart of a document or collection. See *United States v. Dorrell*, 758 F. 2d 427, 435 (9th Cir. 1985) (admission of redaction of written confession not required where separate, removed portion has no bearing on relevant facts); *Brewer v. Jeep Corp.*, 724 F. 2d 653, 657 (8th Cir. 1983) (no abuse in refusal to admit film without companion written report); *Finn v. United States*, 219 F. 2d 894, 901 (9th Cir.) (removal of one document from sheaf not prejudicial), *cert. denied*, 349 U.S. 906, 75 S. Ct. 583, 99 L.Ed 1242 (1955). We believe that the only sound approach is to accord the district court, within its usual evidentiary discretion, the task of determining what reasonable unit of wholeness must be preserved in order to comply with Rule 106's mandate of completeness.

In the case at bar, all of the personnel orders were admitted without editing. All were independently admissible as records "kept in the course of a regularly conducted business activity" and as part of the BPD's "regular practice." Fed.R.Evid. 803(6). Without exception, the orders are simple and unambiguous statements of historical fact. They were introduced in order to place the defendants together with their partners within the district where the victims operated their businesses during the period when the charged crimes occurred. As such, they also corroborated the testimony of

witnesses who said they made payments to certain defendants at certain times.

The documents which defendants claim they were entitled to introduce were, to the contrary, a hodgepodge of anecdotal items. The files held a wide array of miscellany not inherently related to any litigated issue. Appellants do not indicate how, if at all, the diaspora of information contained in the files bore on the merits of the case, contradicted the timing and placement manifested by the admitted documents, or was necessary to explain the orders. Moreover, the lower court never prohibited the defense from offering specific documents on particular points. Seen in this light, it is hard to fault the rejection of the defendants' grab-bag approach to the admissibility of documentary evidence. The court's decision to admit only the personnel orders, and not unexpurgated files, was not an abuse of its broad discretion.¹⁶

X. JURY MISCONDUCT

Three days after the jury verdicts were returned, a juror (Payne) contacted Nave's attorney complaining that the jury had been predisposed to find the defendants guilty. Counsel notified the judge, who met with the attorneys or record and thereafter interviewed Payne in the lawyers' presence. At that

¹⁶ Whether Rule 106 furnishes an independent ground for admissibility is an open question in this circuit. Compare *United States v. Woolbright*, 831 F. 2d 1390, 1395 (8th Cir. 1987) (Rule 106 addresses only order of proof) with *United States v. Sutton*, 801 F. 2d 1346, 1368-69 (D.C. Cir. 1986) (Rule 106 may provide independent basis for admissibility). Inasmuch as defendants' claim founders on other shoals, we need not resolve this conflict today.

time, the juror not only reiterated his concerns about predisposition but stated that, during the trial, a questionable magazine article had circulated in the jury room.¹⁷ Following further discussions with counsel, the judge interviewed the remaining jurors and alternates. Upon completion of that process, defendants moved for a new trial by reason of jury misconduct. The district court, in a meticulously detailed opinion, denied the motions. *United States v. Boylan*, 698 F. Supp. 376 (D. Mass. 1988), concluding that the "case was fairly and impartially considered by a fair and impartial jury." *Id.* at 393.

Appellants attack the court's ruling on several fronts, contending *inter alia* that the inquiry was inadequate; that the judge applied the wrong legal standard in evaluating the taint; and that he impermissibly considered the jurors' subjective mental processes. We begin by assessing the nature and extent of the inquiry. Finding, as we do, that the court's methodology was sound, we then proceed to the merits of the disputed ruling.

A. Nature of the Inquiry.

[41] When a colorable claim of jury misconduct surfaces, the district court has broad discretion to determine the type of investigation which must be mounted. *Hunnewell*,

¹⁷ Occupying part of page 18 of Boston magazine's August 1988 issue entitled "All in the Family", the report offered thumbnail profiles of attorneys whom the "wise guys call" for legal representation. McCormick's trial counsel, Cardinale, was among those mentioned. The article stated in part:

Anthony M. Cardinale, 37, of Boston:

Specializes in defending extortion and racketeering cases. Every troubled mobster in town kisses Cardinale's ring sooner or later. "Every made guy we pick up has Cardinale's name in his wallet," a federal law-enforcement source says. When Cardinale wasn't representing Gennaro Angiulo, he was helping "Fat" Tony Salerno fight his 29-count indictment in New York City. Now he's handling Vinnie "The Pinhead" Ferrara's appeal against the U.S. government.

891 F. 2d at 961; *Nazzaro*, 889 F. 2d at 1167; *United States v. Anello*, 765 F. 2d 253, 259 (1st Cir.), *cert. denied*, 474 U.S. 996, 106 S. Ct. 411, 88 L.Ed.2d 361 (1985); *United States v. Almonte*, 594 F. 2d 261, 266 (1st Cir. 1979); *United States v. Corbin*, 590 F. 2d 398, 400 (1st Cir. 1979). The trial judge may, but need not, convene a fullblown evidentiary hearing. *See e.g.*, *Smith v. Phillips*, 455 U.S. 209, 216-18, 102 S. Ct. 940, 945-47, 71 L.Ed.2d 78 (1982); *Remmer v. United States*, 347 U.S. 227, 229-30, 74 S. Ct. 450, 451-52, 98 L.Ed. 654 (1954) (*Remmer I*); *United States v. Butler*, 822 F. 2d 1191, 1196 (D.C. Cir. 1987). Rather, his primary obligation is to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial. *See Hunnewell*, 891 F. 2d at 961; *United States v. Williams*, 809 F. 2d 75, 85 (1st Cir. 1986), *cert. denied*, 482 U.S. 906, 107 S. Ct. 2484, 96 L.Ed.2d 377 (1987); *Corbin*, 590 F. 2d at 400.

[42] We abjure imposition of a rigid set of rules for the conduct of inquiries into the presence or extent of extrinsic influences. For one thing, the kaleidoscopic variety of possible problems counsels in favor of flexibility. For another thing, jurors should not be subjected to undue impositions. Thus, the scope of such an inquiry "should be limited to only what is absolutely necessary to determine the facts with precision." *United States v. Ianello*, 866 F. 2d 540, 544 (2d Cir. 1989). So long as the district judge erects, and employs, a suitable framework for investigating the allegation and gauging its effects, and thereafter spells out his findings with adequate specificity to permit informed appellate review, *see United States v. Doe*, 513 F. 2d 709, 711-12 (1st Cir. 1975), his "determination that the jury has not been soured deserves great respect [and] . . . should not be disturbed in the absence of a patent abuse of discretion." *Hunnewell*, 891 F. 2d at 961; *see also United States v. Angiulo*, 897 f. 2d 1169, 1185 (1st Cir. 1990).

[43] In this case, the mechanics of the probe are described in detail in the district court's rescript, *see Boylan*, 698 f. Supp. at 377, 380-83, and do not bear repeating. It suffices to say that the inquiry was commensurate to the gravity of the charge and the seriousness of the task: patient, careful, searching, thorough, methodologically sound. From the start, the court and counsel engaged in an ongoing dialogue regarding both procedure and substance. All jurors and alternates were interviewed individually. All counsel were present (or afforded the opportunity to be present) throughout the interrogation. Although the court refused to allow direct attorney participation in the questioning, the lawyers were not shut out of the process. On at least six occasions, defense counsel suggested supplementary questions which were then put to the jurors.

The decision not to conduct a more rigidly structured evidentiary hearing was well within the district court's discretion. Apart from the jury, there were no other witnesses to be examined. It is highly improbable that significantly different or more detailed information would have been elicited if the jurors testified under oath or were subject to cross-examination. We think there was likely too little to be gained to insist, as a matter of law, that the court in such a situation convene a fullblown evidentiary hearing. And as a matter of discretion, we are loath to tinker with the presider's on-the-spot judgment.

In sum, the probe conducted here met, and surpassed, the benchmarks suggested by our earlier cases. *See e.g. Hunnewell*, 891 F. 2d at 961; *Neron v. Tierney*, 841 F. 2d 1197, 1202 (1st Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 90, 102 L.Ed.2d 66 (1988); *Tavares v. Holbrook*, 779 F. 2d 1, 2-3 (1st Cir. 1985); *Anello*, 765 F. 2d at 258-59. The contention that the district court's inquiry was inadequate is without merit.

B. Results of the Inquiry.

Defendants' remaining assignments of error challenge in one way or another the validity of the district court's conclusion that the claimed "jury misconduct" did not warrant a new trial. The challenge is essentially trichotomous.

[44] 1. *Rule 606(b)*. Appellants' initial sally suggests that the lower court flouted Fed.R.Evid. 606(b).¹⁸ The rule amalgamates the common law prohibition against using juror testimony to impeach a verdict, *Tanner v. United States*, 483 U.S. 107, 107 S. Ct. 2739, 2745-46, 97 L.Ed.2d 90 (1987), and a recognized exception: where extraneous influence has allegedly infected the panel, juror testimony should be allowed. *Rushen v. Spain*, 464 U.S. 114, 121 n. 5, 104 S. Ct. 453, 457 n. 5, 78 L.Ed.2d 267 (1983) (per curiam); *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 53, 36 L.Ed. 917 (1982). Under 606(b)'s constraints, intrusions into the jury's deliberative processes are sharply curtailed; insofar as deliberations are concerned, the court is "precluded from investigation the subjective effects of any breach on any jurors." *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975). This may be easier said than done: while the line between the jury's deliberations and the rest of the trial is fairly straightforward, there is a much finer line between "subjective" and "objective" matters. Realistically, appellate

¹⁸ The rule states in pertinent part:

Upon an inquiry into the validity of a verdict . . . , a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or to dissent from the verdict or . . . concerning the juror's mental processes . . . , except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Fed.R.Evid. 606(b).

courts must grant the trier a margin of error in separating wheat from chaff.

[45] Here, we think the court hewed close enough to the line. While the juror may from time to time have misconstrued the questioning and based his or her answers on an arguably subjective aspect of deliberations, the record leaves no doubt but that the judge was sensitive to the problem and in the main screened out such responses. Moreover, the court's prophylactic instructions alerted each juror, both before and during the inquiry, that the deliberative process itself was not a matter for discussion.¹⁹ While the question is not free from all doubt — it will rarely be in this murky area — we have examined both the interview transcripts and the district court's rescript and cross-compared the two; in the course of that exercise, we do not find any cogent reason to believe that the judge recklessly invaded forbidden territory or improperly relied on the jurors' insights as to their subjective mental processes during deliberations in contravention of Rule 606(b).

2. **Presumptive Prejudice.** Defendants next assail the lower court's refusal to employ a *Remmer*-type presumption of prejudice. See *Remmer I*, 347 U.S. at 229, 74 S. Ct. at 451 (*ex parte* communication contact, or tampering with a juror during the trial about a matter pending before the jury is presumptively prejudicial, placing burden upon the government to establish harmlessness.) In *Remmer I*, a third party offered money to a juror during the trial in exchange for a favorable outcome. The juror promptly reported the incident to the judge, who, without informing defendant, referred the matter to the FBI. Following a guilty verdict, the defendant

¹⁹ In one of several such admonitions, the district court inveighed: I won't ask you about what happened during your deliberations. I am not going to ask you what was going on in your mind. Those were all secret. You don't have to explain your verdict to anybody . . . But I do want to ask you about some other things that may have happened before you went to the jury room.

learned about the incident and sought a retrial. The district court held an evaluative hearing, deemed the FBI investigation adequate, and denied further relief. The court of appeals affirmed. 205 F. 2d 277 (9th Cir. 1953).

The Supreme Court was not so sanguine. It concluded that a post-verdict inquiry "with all interested parties permitted to participate" was an appropriate vehicle for gauging the incident's impact, but vacated the judgment and remanded "to determine whether the incident complained of was harmful to the [defendant]." 347 U.S. at 230. In a subsequent opinion in the same case, the Court made clear that the hearing should have focused not solely on the FBI's professionalism but also on the intrusion's effect vis-a-vis the juror. *Remmer v. United States*, 350 U.S. 377, 279, 76 S. Ct. 425, 426, 100 L.Ed. 435 (1956) (*Remmer II*).

According to *Remmer II*, the "presumption" of prejudice fashioned by the *Remmer I* Court stemmed from "the paucity of information relating to the entire situation" and the "kind of facts alleged." *Id.* 350 U.S. at 379-80, 76 S. Ct. at 426-27. In the case at bar, neither of those preconditions obtain. As to the first precondition, the data available here is quantitatively and qualitatively satisfactory to permit meaningful review. There is an abundance of information rather than a paucity: all jurors and alternates were questioned exhaustively about both the magazine piece and the challenged predeliberation conversations. The absence of third party involvement made a broader hearing superfluous. The defendants, through counsel, were given an opportunity to attend the interviews and suggest areas for questioning. The court's written opinion and precise findings presented an extremely vivid picture of what happened and left no doubt as to the trial judge's assessment of how these events impacted upon the jurors.

[46] The second precondition relates to "the kind of facts alleged." *Id.* at 380, 76 S. Ct. at 427. In *Remmer*, the claimed misconduct was bribery, a direct attempt improperly

to influence the case's outcome. The claimed misconduct here, which involves no *ex parte* contact with any juror, is qualitatively different. The nature and import of this sort of difference was highlighted by the Court in *Smith*, 455 U.S. 209, 102 S. Ct. 940. There, a sitting juror, during the trial, applied for a job as an investigator in the prosecutor's office. When this was brought to light, the court conducted a post-verdict hearing, relied on the juror's testimony, found the juror unbiased, and ruled that the behavior, although regrettable, did not necessitate retrial. The Supreme Court refused to apply a *Remmer*-type presumption and impute juror bias, commenting that:

The[] cases demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation . . . ; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer*

Smith, 455 U.S. at 217, 102 S. Ct. at 946. Thus, *Smith* requires a fair hearing for nonfrivolous claims of extraneous influence or the like, but does not strictly mandate the use of a rebuttable presumption in every case. Rather, the presumption is applicable only where there is an egregious tampering or third party communication which directly injects itself into the jury process. Put another way, the *Remmer* standard should be limited to cases of significant *ex parte* contacts with sitting jurors or those involving aggravated circumstances far beyond what has been shown here.

[47] The case before us has none of the hallmarks necessary to animate such a presumption.²⁰ The *Remmer* Court “recognized the seriousness not only of the attempted bribe, which it characterized as ‘presumptively prejudicial’, but also of the undisclosed investigation which was ‘bound to impress the juror . . . ’” *Smith*, 455 U.S. at 215-16, 102 S. Ct. at 944-45 (quoting *Remmer I*, 347 U.S. at 229, 74 S. Ct. at 451). Our case is a different breed of cat. The most significant disparities, we think, are that the *Remmer* bribe, unlike the magazine article (1) was unlawful in itself and (2) related directly to the matter pending before the jury. Here, the piece on Cardinale, while arguably exaggerated and in poor taste, did not refer to the case, the trial, the defendant, or their activities. We believe that the facts of the instant matter distinguish it from matters where the probability of jury prejudice was intolerably great. Compare *United States v. Littlefield*, 752 F. 2d 1429, 1432 (9th Cir. 1985) (magazine article on tax cheating, read in jury room during trial on fraudulent tax scheme); *United States v. Perkins*, 748 F. 2d 1519, 1534 (11th Cir. 1984) (juror’s remarks during deliberations to the effect that he knew defendant); *Howard*, 506 F. 2d at 867 (juror’s disclosure to other jurors that defendant had been in trouble previously) with *United States v. Uribe*, 890 F. 2d 554, 560-61 (1st Cir. 1989) (posttrial disclosure that juror had previous disagreement with one defendant not presumptively prejudicial as to other defendant); *Nazzarro*, 889 F. 2d at 1167-68 (newspaper story concerning corrupt police officers not presumptively prejudicial as to police officer defendant in unrelated case); *United States v. Porcaro*, 648 F. 2d 753, 756-58 (1st Cir. 1981) (no presumption of prejudice where newspaper pieces “contained no prejudicial characterizations of appellant himself, his reputation, prior acts, arrests, or convictions, nor any speculation as to his guilt or

²⁰ Because we conclude that the prerequisites for a *Remmer* presumption are not met in the case at bar, we need not chart with precision the reach of the *Remmer* rule in the albedo of *Smith* and *Rushen*. See *Angiulo*, at 1185 (leaving question open).

innocence"). Because the article was not "logically connected to material issues in the case . . . to find a material connection between the extraneous information and the jury's verdict 'would require an assumption that the jury members reached an irrational conclusion.' " *Dickson v. Sullivan*, 849 F. 2d 403, 407 (9th Cir. 1988) (quoting *United States v. Bagnariol*, 665 F. 2d 877, 888 (9th Cir. 1981) (per curiam), cert. denied, 456 U.S. 962, 102 S. Ct. 2040, 72 L.Ed.2d 487 (1982)). We will not essay so long a logical leap — nor will we fault the district court for eschewing it. Cf. *Angiulo*, at 1185 (*ex parte* contact more likely harmless if not pertinent to substantive matters at trial).

By the same token, the juror's midtrial buzznacking also lacked the strong degree of probability needed to animate a *Remmer*-type presumption. See e.g., *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 1643, 6 L.Ed.2d 751 (1961); *Reynolds v. United States*, 98 U.S. 145, 155-56, 25 L.Ed. 244 (1878). This is particularly so given the district court's express (and well substantiated) finding that no jury-room discussion had occurred "which reflected a fixed opinion or which would have influenced any other juror to close their mind to the remaining evidence." *Boylan*, 698 F. Supp. at 393.

[48] 3. Assessment of the Facts. Appellants also asseverate that the judge unreasonably and unsupportedly denied them a new trial based on contamination of the jury. In approaching this issue, we adopt the Second Circuit's description of the beacon by which courts must steer: the criterion for a "post-verdict determination of extra-record prejudice must be an objective one, measured by reference to its probable effect on a 'hypothetical average juror.' " *United States v. Calbas*, 821 F. 2d 887, 896 (2d Cir. 1987), cert. denied, 485 U.S. 937, 108 S. Ct. 1114, 99 L.Ed.2d 275 (1988). In determining whether the trier strayed off course, we use an abuse-of-discretion compass.

[49] In this instance, we find the district court's conclusions to be unimpegnable. Indeed, even if a *Remmer*-type presumption had come into play, it would be overcome by the cogency of the findings, 698 F. Supp. at 392-93, that the circulation of Boston magazine among some jurors, and the jurors' remarks during trial, whether viewed separately or collectively, were harmless. See *United States v. Hornung*, 848 F. 2d 1040, 1044 n. 3 (10th Cir. 1988), *cert. denied*, U.S. , 109 S. Ct. 1349, 103 L.Ed.2d 827 (1989); *United States v. Hillard*, 701 F. 2d 1052, 1064 (2d Cir.), *cert. denied*, 461 U.S. 958, 103 S. Ct. 2431, 77 L.Ed.2d 1318 (1983).

[50] There is no necessity, drawing nigh the end of so protracted an opinion, to wax longiloquent. The jurors' assertions of continued impartiality, favorably appraised by the court, comprise testimonials that are not "inherently suspect," for a juror is "well qualified to say whether he has an unbiased mind in a certain matter." *Smith*, 455 U.S. at 217 n. 7, 102 S. Ct. at 946 n. 7 (quoting *Dennis v. United States*, 339 U.S. 162, 171, 70 S. Ct. 519, 523, 94 L.Ed. 734 (1950)); see also *Angiulo*, at 1186-87 (trial court may rely on juror's statement of continued impartiality); *Butler*, 822 F. 2d at 1196 (juror's statement that improper contact would have no bearing was considered reliable); *United States v. Pennell*, 737 F. 2d 521, 533 (6th Cir. 1984) (court may rely upon juror assurances of continued impartiality).²¹ On the whole, the record bulwarks the court's conclusion that the juror's answers were credible and their statements reliable. The court's recital of a

²¹ To be sure, we recognize that a juror may be reluctant to impeach the verdict or "to admit that he himself acted improperly." *Smith*, 455 U.S. at 236, 102 S. Ct. at 956 (Marshall, J., dissenting). But, there are telltales in the record to indicate that these jurors were especially forthcoming. Several of the jurors admitted reading *Boston* magazine; there was no suggestion of a connection between it and the defendants; in fact, several jurors stated that it had nothing to do with the case. And the judge set forth a number of other reasons to bolster his conclusion that, in this inquiry, the jurors were forthcoming. See e.g. *Boylan*, 698 F. Supp. at 392-93.

near-googol of other reasons indicating continued impartiality, 698 F. Supp. at 393, most based on personal observation, comports with the record and deserves great respect. Even though some jurors acknowledged commenting on the evidence, particularly in reference to defendant Sheehan, their discussion, as depicted in the majority of the interviews, were not so extensive or pervasive as necessarily to have affect the verdict's integrity.²²

In short, the evidence adduced through the juror interviews indicated no actual bias. The trial judge's findings confirmed this conclusion. His record-rooted evaluation of the situation merits considerable weight. *See Hunnewell*, 891 F. 2d at 961; *Dickson*, 849 F. 2d at 405; *United States v. Santiago-Fraticelli*, 730 F. 2d 828, 830 (1st Cir. 1984). What is more, the judge instructed the jury on several occasions during the trial to keep their minds open, to remember the presumption of innocence, and the like. There is a presumption that the jurors followed these instruction — and nothing tangible here to surmount it. Appellants' claims of irremediable prejudice were sufficiently addressed and rebutted. There was no abuse of discretion anent the denial of posttrial relief.

XI. CONCLUSION

We need go no further. Our trek through the long and sordid record indicated that these seven defendants were fairly tried and justly convicted. In the end, an impartial jury, confronted with a mass of powerful evidence, concluded that the badge had been tarnished. No reversible error appearing, the defendants' convictions are **Affirmed**.

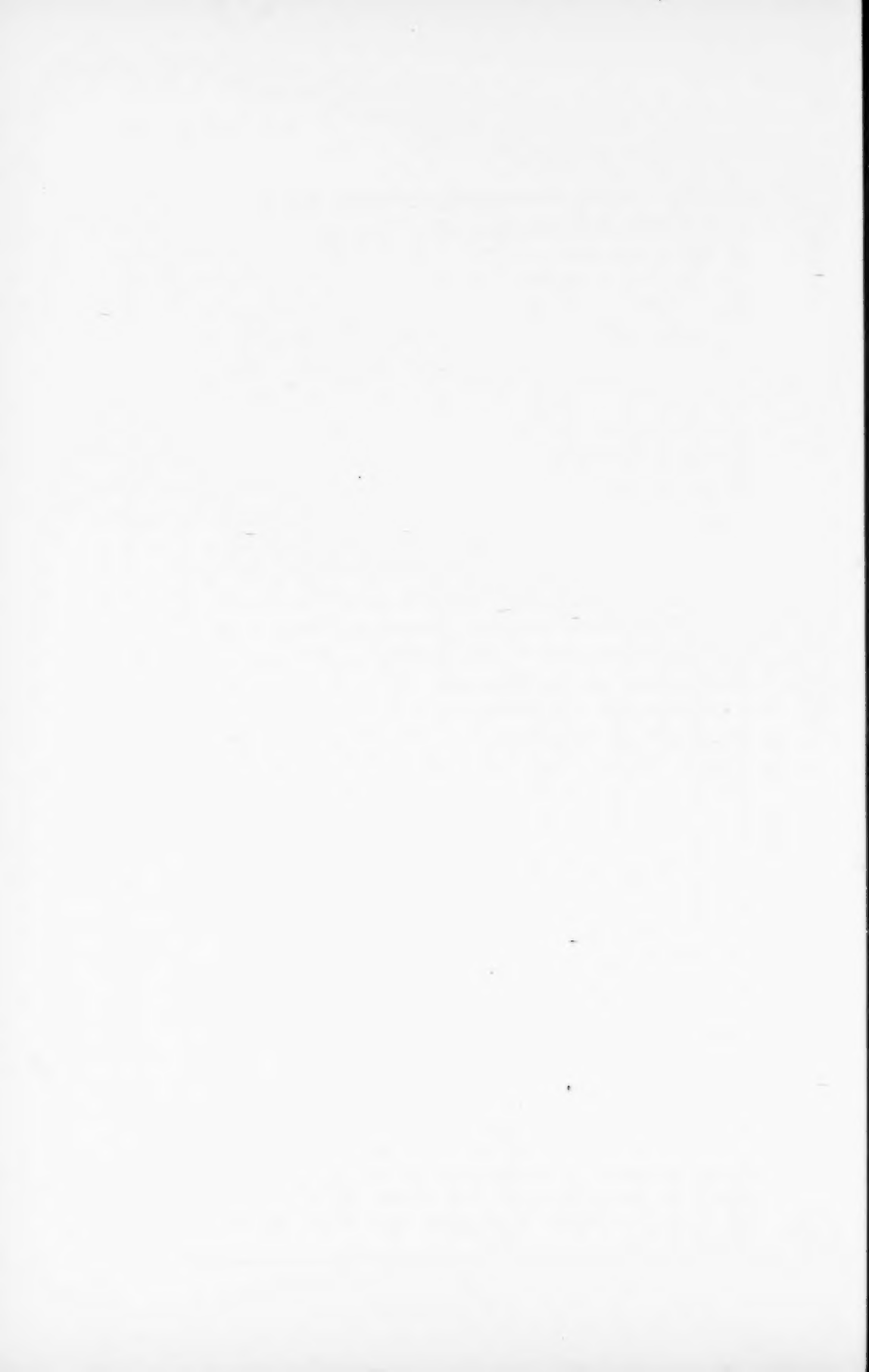
²² Interestingly, only seven out of the jurors confirmed that any comments had been made about the case. *See Boylan* 698 F. Supp. at 380, 392. It is also noteworthy that the judge found, supportably in our view, that: "No juror corroborated the original juror's account" of the remarks made anent defendants' guilt. *Id.* at 392-93.

APPENDIX: ANATOMY OF THE INDICTMENT

SERIES*	COUNTS	ESTABLISHMENT/ PAYOR	DEFENDANTS CHARGED	OTHER DEFENDANTS DIRECTLY INVOLVED	CHARGES**
A-J	1	All listed below	All		RICO Conspiracy
A-J	2	All listed below	All		Racketeering
A	3-11	88 Queensbury; Kentucky Tavern/ Norman Chaletsky	Sheehan, Connolly	Killroe	Hobbs Act, Conspiracy
B	12-20	The 1276/ Joseph McGowan (Chaletsky, co-owner)	Boylan, Carey, Killroe, McDonnick, Nave	Connolly, Sheehan	Hobbs Act, Conspiracy, Aiding & Abetting
C	21-25	Play It Again Sam's; Frank 'M' Steine/ Thomas Moloney	Killroe	Boylan, McDonnick	Hobbs Act, Conspiracy
D	26	Patrick Brady's/ Warren Frank (Moloney, co-owner)	Killroe	Boylan	Hobbs Act
F	27-32	Mine Lansdowne/ The Blackie Brothers	Killroe, Nave, Sheehan	Boylan	Hobbs Act, Conspiracy
H	None	Café Budapest/ Edith Ben (John Moriarty, mgr.)	None	Connolly, Sheehan	No substantive charges
I	34-38	Metrol; Spit/ Jean Tasse	Boylan, Connolly, Nave, Sheehan	None	Hobbs Act, Conspiracy
J	40-58	United Liquors/ Mary Fortier	Nave, Sheehan	Boylan	Mail Fraud, Conspiracy

* Series E charged Connolly and Sheehan. At the close of the government's case, the court granted their motions for judgment of acquittal. Series G (count 33) charged Nave. It was dropped before trial.

** "Conspiracy" refers to charges brought under 18 U.S.C. § 1351, except for count 58 (which charged a conspiracy under 18 U.S.C. § 371).



APPENDIX C

UNITED STATES OF AMERICA

v.

PETER BOYLAN, *et al.*

Crim. A. No. 87-342-MA.

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS.

Oct. 7, 1988.

As Amended Oct. 11, 1988.

Diane Kottmyer, James B. Farmer, Boston, Mass., for
U.S.

Thomas J. Ford, Boston, Mass., Paul Buckley, Milton,
Mass., Buckley, Haight, Muldoon, for defendant Peter
Boylan.

Regina Quinlan, Boston, Mass., for defendant John E.
Carey.

Albert F. Cullen, Jr., law offices of Albert F. Cullen, Jr.,
Boston, Mass., for defendant Thomas J. Connolly.

Martin K. Leppo, Leppo & Traini, Randolph, Mass., for
defendant Matthew A. Kilroe.

Anthony M. Cardinale, Boston, Mass., for defendant
John F. McCormick.

Paul F. Markham, Boston, Mass., for defendant Ken-
neth J. Nave.

Robert Muse, Boston, Mass., for defendant Francis X.
Sheehan.

MEMORANDUM AND ORDER

MAZZONE, District Judge.

This matter is before the Court on defendants' various motions based on jury misconduct. The events which precipitated these motions began on September 13, 1988 when a jury returned a guilty verdict on fifty-six of fifty-seven counts against the seven defendants following an eleven week trial. On September 16, three days after the verdict was returned, a juror phone Paul F. Markham, one of the defense counsel, and stated that the jurors had discussed the case during the trial and were predisposed to find the defendants guilty before deliberations began. According to an affidavit subsequently filed with the Court by Mr. Markham, the juror expressed a desire to speak only to defense counsel. Mindful of *United States v. Kepreos*, 759 F. 2d 961 (1st Cir.), cert. denied, 474 U.S. 901, 106 S. Ct. 227, 88 L.Ed.2d 227 (1985), Mr. Markham contacted me at home and advised me of the juror's call. Also mindful of *Kepreos*, I set the matter down for hearing at which defense counsel moved jointly to interview the juror without the presence or participation of either the Court or the government. I decided to interview the juror in the presence of all counsel pursuant to Fed.R.Evid. 606(b), although I did not rule formally on the defendants' motion. The juror's identity was not divulged to me or to the government until he appeared at the hearing on September 20. At that hearing, the juror reiterated the statement he had made to Mr. Markham. He also stated that a particular magazine article and unspecified newspapers had circulated among jurors in the jury room. As a result of this initial interview, I decided to question the entire panel, including the alternates. Fourteen jurors were interviewed on September 21 and the last juror was interviewed on September 26.

Following the interviews, the defendants moved for a new trial incorporating within the motion a request for an evidentiary hearing. The motions present the following issues: (1) whether defense counsel should have been permitted to interview the juror without the Court present; (2) whether I should grant the motion for a new trial based on the claim that extraneous prejudicial information reached the

jury and that the jury was predisposed to convict the defendants; and (3) whether I should order a formal evidentiary hearing, before another judge, at which the jurors would be questioned and cross-examined while under oath.

I set out the facts of this case in detail because they are crucial to understanding the serious issues raised by the defendants' motions. In so doing I am mindful of the Supreme Court's admonition that ultimately, "each case [of alleged juror misconduct] must turn on its own special facts." *Marshall v. United States*, 360 U.S. 310, 312, 79 S. Ct. 1171, 1172, 3 L.Ed.2d 1250 (1959) (per curiam); see also *Smith v. Phillips*, 455 U.S. 209, 222, 102 S. Ct. 940, 948, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring) ("each case must turn on its own facts . . . [except in] some extreme situations"); *Neron v. Tierney*, 841 F. 2d 1197, 1201 (1st Cir. 1988) ("[w]e have long acknowledged the case-specific nature of such explorations").

I.

On November 9, 1987, three current and four former members of the Boston Police Department were indicted for violations of federal anti-racketeering and anti-corruption laws. The fifty-seven count indictment charged the defendants with soliciting and accepting money and other things of value from certain bars and nightclubs in exchange for special services and help in avoiding certain licensing requirements.¹ Jury selection began on June 27, 1988, from a panel of

¹ Not every defendant was charged on every count. The first two counts charged all seven defendants with violations of 18 U.S.C. Secs. 1962(c) and (d) (RICO). Five counts charged various defendants with violations of 18 U.S.C. Sec. 1951 (conspiracy to extort). Thirty-one counts charged various defendants with violations of 18 U.S.C. Secs. 1951-2 (extortion). Seventeen counts charged two defendants with violations of 18 U.S.C. Secs. 1341-2 (mail fraud). The last count charged the same two under 18 U.S.C. Sec. 371 (conspiracy to commit mail fraud).

approximately 150 jurors. The panel was first subjected to a general voir dire consisting on standard questions about their knowledge of any parties, lawyers, or witnesses in the case, exposure to any publicity about the case, and any strong feelings about or connection with law enforcement or licensing boards. Then the panel was given preliminary instructions about general principles of law applicable to criminal cases, including the presumption of innocence. The panel was advised that it was their duty to render a verdict based solely on the evidence. Other routine questions followed, including the presumption of innocence. The panel was advised that it was their duty to render a verdict based solely on the evidence. Other routine questions followed, including inquiries about any prior experience as jurors, any disabilities that might interfere with jury service, and whether anything might prevent them from serving for at least eight weeks, the expected duration of this case. Jurors who responded affirmatively to these inquiries were then questioned individually at sidebar outside the hearing of the rest of the panel.

Following this general screening, each juror was called into the lobby for an additional individual voir dire. The purpose of this voir dire was to address certain sensitive and particularly significant matters, most notably the homosexual clientele of some of the establishments involved in this case. The issue of alleged corruption in the Boston Police Department was also addressed. All seven defendants were present. Both defense and government counsel participated in the questioning. The media was invited to attend and remained present at least through the beginning of the inquiry. After some jurors were excused for cause as a result of this voir dire, a panel of thirty-eight was chosen randomly from those remaining. The parties consulted amongst themselves and exercised their preemptory challenges, selecting a panel of sixteen jurors. Counsel agreed that four of these jurors would be randomly designated as alternates before deliberations began.

After the jury was sworn and in accordance with my usual practice, I gave the jury preliminary instructions before counsel made their opening statements. Each juror was provided with a notebook and instructed on the taking and use of notes. I admonished them not to discuss the case among themselves or with others, and not to read, watch or listen to any media reports about the trial. Similar instructions were repeated from time to time throughout the trial, especially the instruction about the media reports because of the significant publicity attending the trial. On several occasions, at the request of counsel, I asked the jury whether they had seen or read a particular newspaper or magazine article. The responses to these inquiries were negative. I was not asked to inquire about the specific magazine article which the defendants claim prejudiced the jury in this case, although I was informed of the article at a sidebar conference.

The trial lasted forty-seven days. The evidence consisted of the testimony of seventy-two witnesses and over 300 exhibits, including many audio and video tapes of meetings between some of the defendants and key government witnesses. The trial, while protracted and contentious, was not factually complex. In opening statements, defense counsel outlined the evidence they believed was forthcoming, and stated that it would demonstrate that the defendants merely accepted gifts or gratuities and were not bribed or involved in extorting payments. These conflicting theories were presented clearly, forcefully and consistently to the jury.

Each juror was present at every day of the trial, which continued day to day except for one holiday and one day when I was required to attend a meeting in Washington. The trial day began at 9:30 a.m. and concluded at 2:00 p.m., Pastries and beverages were provided daily to the jury during a late-morning break. The jury was attended by the same two experienced and capable court officers throughout the trial. Jurors entered and departed the courthouse by rear elevators not generally available for public access to the twelfth floor

level. This regimen, it can be seen, placed the jurors in close and isolated daily contact with each other during the trial.

The jury received their final instructions on September 6, 1988. The four alternates were randomly chosen and the remaining twelve began their deliberations that afternoon. They deliberated for approximately thirty-five hours over five and one-half days. On their first day, they requested a list of exhibits, copies of the indictment and charge, and a trial transcript.² They also requested an audio tape player and video cassette recorder and spent nearly an entire day reviewing tapes. While they were deliberating they also submitted several questions to the Court, including one about a confusing typographical error in the indictment which had escaped the attention of both the Court and all counsel, and another in which they sought to learn why a specific dollar amount was missing from Count 16.

On the fourth day of deliberations, a newspaper article was published about a speech made by the Chief of the Justice Department's New England Organized Crime Strike Force. The speech referred to the role certain criminal defense lawyers allegedly played in aiding their clients to identify and "silence" government informants. Although no lawyers were named, a reputed leader of organized crime was identified. This person had been previously represented by Anthony Cardinale, a lawyer representing a defendant in this case. The author of the story solicited a response from Mr. Cardinale which appeared at the end of the article. At the defendants' request the Court asked the jury if they had read the article. One juror responded that he had read the article.³ After questioning this juror about the article at sidebar, I determined that he had not been prejudiced and I allowed him to continue to deliberate. I reminded the jury of their responsibility to decide the case solely on basis of the evidence admitted at

² They were provided with copies of the indictment and charge but not a trial transcript.

³ This is the same juror who later contacted Mr. Markham.

the trial, and I repeated my instruction that they not read, watch or listen to anything related to the trial reported by the media. I then denied defense counsel's motions for a mistrial and to sequester the jury.

On September 13, 1988, the jury returned a verdict of guilty on fifty-six out of fifty-seven counts.⁴ Defense counsel requested that the jury be polled individually for each count as to each defendant. Three jurors were polled in this fashion before defendants Nave and Sheehan waived polling on Counts 41-58, counts in which they alone were charged. Thereafter, each remaining juror was polled only as to Count 1-40. The return of the verdict and polling lasted one and one-half hours. As to each defendant and each count, every juror responded "Guilty" except in three instances when they answered "Not Guilty." In all, there were a total of 1,314 individual responses. Just like the other jurors, the juror involved here was asked eighty-nine times for his verdict as to the various defendants. He responded "Not Guilty" three times, and "Guilty" eighty-six times.

Three days after the trial, the juror contacted Paul Markham. Mr. Markham informed me of the call and I ordered him to desist from initiating any contact with the juror without the Court's express permission. Shortly thereafter, I called in all counsel and held a hearing. The juror, whose identity was unknown to me, appeared and I interviewed him in the presence of all counsel pursuant to Fed.R.Evid. 606(b). The interview was tailored to comply with the rule and thus was narrow in scope. I asked the juror about jury predisposition towards guilt and about extraneous influences on the jury such as media reports.

Understandably, the juror appeared quite nervous. During the court of the interview, he disclosed that some of the post-verdict media coverage had upset him a great deal. He

⁴ The two defendants named in Count 28 were found not guilty. In addition, defendant Nave was found not guilty on Count 40.

specifically mentioned being "unhappy" about an article concerning the owner of a gay bar who had instigated the investigation of these police officers. In response to my question about a presumption of guilt among certain jurors, he stated that jurors had been discussing the case throughout the trial, that some jurors had expressed the view that the defendants were guilty as early as the second day of the trial, and that one juror had commented that defendant Sheehan "was a crook." He felt that other jurors were not considering the defendants to be innocent and that this made him want to "get out of it" but that he thought he should stay in to "protect" the defendants. He also stated that these jurors' views did not sway his view of the evidence; he said he "tried to be objective on everything" and continued to take notes.

This juror also reported that one juror had circulated a *Boston Magazine* clipping containing a reference to defense counsel Cardinale. Although this juror did not read or discuss the article in the jury room, he knew it was about those attorneys who "take care of the Mafia" because he went out and purchased the magazine later. He also reported that earlier, other articles were circulated but he could not provide any details. He thought Mr. Cardinale was again mentioned in those articles but he was not sure.

As a Result of this interview, I decided to interview the rest of the jury panel about the two major issues raised by this juror. All fifteen were interviewed using basically the same format as with the initial juror. First, I told them that it had been brought to my attention that there may have been newspaper or magazine articles circulated among the jury and I asked them to tell me if they had seen, read or discussed any articles. When it was appropriate, I followed up by asking if the article or discussion had influenced the way they viewed the ensuing evidence in the case when they returned to the courtroom. Second, I asked them whether there had been any remarks or discussion by the jury about the case before deliberation began. Again, I followed up on this question by asking

whether any remarks or discussion had influenced the way they continued to view the evidence. All jurors were admonished not to discuss the inquiry with anyone.

Only six of fifteen jurors recalled hearing some remarks made about guilt, evidence or the character of the defendants. The following excerpts of the affirmative responses to this question. Each number below represents a different juror.

(1) [Were there any such discussion that you heard?] "No. Well, I don't know if there were discussion but there may have been remarks, yes." [And what was the nature of those remarks? What were they specifically?] "Oh, something that maybe the evidence was showing that they were more apt to be guilty than not." [And was there any particular person mentioned as the one against whom the evidence might be showing up?] "Probably Mr. Sheehan." [And was it a — and is that what you can best tell us, your best memory that there was some discussion about he was probably — the evidence showed that —] "It's so hard to remember exactly but I think that's how it went."

(2) [Were there any such discussion?] "Um, I'm trying to think now. Well, I guess there were a few remarks made." [What were those remarks and by whom?] "Um — " [Well, what were those remarks first of all?] "I'm trying think who — I don't remember now who — I guess it was to the effect that if someone had their hand in the cookie jar, they expect to get caught." [And as to which defendant did that pertain or was —] "To all of them. It was like a blanket remark." [And when did this take place?] "It was the beginning of the trial I believe." [When? Can you be a little more specific?] "I really don't remember." [And do you remember who made the statement?] "No." [Was there any expression or any description of any individual as a crook or a thief or guilty or whatever?] "Ah, no, just that remark sticks in my head."

(3) [At any time was there any such discussion or were any such statements made?] "The only thing that I remember

is about Sheehan signing the checks and he had already admitted that anyway. I heard that much." [And that was a discussion that —] "Not really a discussion. Just, you know, in passing sort of." [And tell us exactly what it was that he —] "That he had signed and cashed checks that were not in his name." [Yes. And you said something about he admitted that?] "That he had already admitted that he had signed those checks and cashed them." [Was there any expression about his character as a result of that or his guilt./] "No." [Did anybody say anything about him particularly?] "Just that is all I recall." [Okay. After that — statement — when was that statement made?] "Oh, I don't know. It may have been after we heard his lawyer say that he had admitted to it." [First day, second day of trial?] "Yeah, Yeah."

(4) [And the question I want to ask you is whether or not at any time during the trial, not the deliberations, did you or any juror make any such statements or discuss any such conclusions that you reached or that the jury had reached regarding any or all of the defendants?] "Every so often you hear a remark but that was just about what you hear anywhere, whether this was in the jury room or whether it was anywhere on the street or anywhere else. There was no concrete, anybody saying, you know, making a statement of fact." [Did anybody ever say, for example, that Sheehan was a crook or did you hear that statement made?] "No, I didn't hear that." [Did you hear anybody say something like these defendants got their hands caught in the cookie jar?] "No." [Did anybody ever say, well, the evidence against him is pretty strong, he's probably guilty?] "No." [Did anybody ever say —] "I've heard a remark that there was an awful lot of evidence here." [Yes. And when did that take place?] "or words to that effect." [Yes. And during the course of that — when during the course of the trial did that occur?] "Oh, I couldn't actually say. Near the end." [Did it happen once or throughout the trial?] "Just once that I actually heard a statement of that." [And that's all the statements or remarks that you can recall?] "um-hmm."

(5) [. . . did you or any other juror make any statements or discuss any conclusions as to the conclusions, opinions that have been reached as to any or all of the defendants?] "No." [Did anybody say or discuss a particular defendant and say something about that defendant's nature or that defendant's character or the evidence against that defendant and its strength?] "No, not what you would say that we would sit here and discuss it. Even if there was anything, it was quickly hushed up. Nobody went into it. We just said, you know, as we were, like coming upstairs and, say, God, that looks, you know, and, that was as far as it went." [Finish that. That looks what?] "That looks like, you know, a lot of evidence there. But that was just as the trial was going on for our benefit. But that quickly, you know, then we start talking about the weather or anything like that. We never pursued any matter each day of trial like that if you want to say like that." [What I want to know, is you do say that during the course of the trial there may have been or were some remarks made about the evidence or that's a lot of evidence?] "No, not that deep. Not that deep. Just pertaining to a person who was on trial that day or at that time, might have said a few words but that it was quickly dropped. It wasn't carried like a conversation of anyone talking about it." [Can you tell me can you give me just an example of what was said?] "Right at the very beginning, probable Mr. Sheehan, when he was brought on trial there; but otherwise on that" [And what was said then?] "He had a lot of charged but that was about it. We more or less tried to figure what the counts were against him, you know, because we didn't fully understand it as it was just fresh to us. But that was quickly dropped. As the trial went on, it sort of like gelled in. But that was all. We didn't sit and discuss it or anything like that. If it was anything, it was about like a 2-second discussion. And that was it. Completely dropped." [Did all of the jurors take part in this? "No. No. No." [Okay. Now, whatever was said, whatever remarks about Mr. Sheehan —] "Right." [and about any other defendant or about any other evidence, was that —] "No, he was

the only one I would say." [The only one?] Because he was the first one, you know, I can remember there. And, you know, he seemed to have a large amount of charges against him. But, like I said, it was quickly dropped." [Okay.] "As we realize, you know, sit here and keep talking about it now, you know. It wasn't a discussion, put it that way."

(6) [. . . Do you recall any such statements being made, including if you —] "I've heard lots of opinions over the trial — over the period of the trial. And as far as I'm concerned, that's about it. There were opinions, you know. A lot of people, you know, said how they felt about this and that, you know, or they discussed it. And someone would say, well, you know, you're not supposed to talk about that, you know. And it just ended like that. It just everyone had their opinion basically, you know." [Was there a particular defendant about whom they voiced an opinion or, as I say, even yourself, voiced an opinion or all of them, all of the defendants?] "Um, I would say . . . There was opinions about, you know, a few here and there, you know. But it was nothing that made, like a lasting impression on anyone, you know. It was just like I said, we heard opinions about it. Everyone said, you know, that or that one, you know, I think, you know, he might be guilty of that but I'm not sure. I'd like to see more of this or that, you know, things of that nature. But nothing was really concrete, you know. It was just, you know, well, I think this and that, you know. And then someone would say, you know, don't talk about it, you know." [I just want to be a little more particular. Did anybody ever mention that Frank Sheehan was guilty or did you say Frank Sheehan was guilty or that he was a crook or that the defendants had their hands in the cookie jar or that the evidence looked like it was pretty strong or that there was a lot of evidence, those kinds of remarks?] "I think everyone thought that both cases were represented well, defense and the prosecution. And I don't remember hearing any strong points about any one side that I heard, you know." [But there were some expressions throughout the trial. Jurors would voice an opinion about this defendant or that case or

this case. And, I mean, this count or that charge or this] "I can't really remember any specific defendant that might have been, you know, you know, somebody might have given their opinion on. I mean, you know, pretty much. But I don't think, you know, it was just discussion. You know, what do you think of this, what did you think of that. It wasn't like, he's guilty or, you know, probing questions, you know, what do you think about this or that, you know. I think, you know, he might have done this but I'm not sure, what do you think, you know, things like that."

No one corroborated the original juror's statement that someone had said "they're all guilty." Every single juror responded that whatever comments were made, it had not influenced the way they viewed the evidence.⁵ Moreover, many jurors responded vehemently that they had "decided the case based on the evidence."

As to the *Boston Magazine* article, nine of the sixteen jurors had read or seen the short piece concerning Mr. Cardinale. Five jurors stated they had not read it. Of those who saw it or read it, six said it had been commented upon or discussed. However, several of the comments related only to the picture which accompanied the article. All jurors responded that it had not influenced the way they viewed the evidence in the case or how they viewed Mr. Cardinale or his client.

I now turn to an extended discussion of the specific issues presented by these events. The discussion is lengthy not because of the novelty of the issues, but because of their critical importance in this case.

⁵ One juror said in response to the question about whether they had been influenced: "I don't think so but I did have it in the back of my head."

II.

The law governing post-verdict disclosures of alleged extraneous and prejudicial influences on the jury accommodates two fundamental but conflicting policies. *United States v. Howard*, 506 F. 2d 865, 868 n. 3 (5th Cir. 1975); *United States v. Miller*, 403 F. 2d 77, 82 (2d Cir. 1968); see also *McDonald v. Pless*, 238 U.S. 264, 267, 35 S.Ct. 783, 784, 59 L.Ed. 1300 (1915) ("When the affidavit of a juror, as to [jury] misconduct . . . [is presented,] the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room."); *United States v. Bailey*, 834 F. 2d 218, 223-25 (1st Cir. 1987). On one hand, substantial policy considerations support "the near universal and firmly established common-law rule flatly prohibit[ing] the admission of juror testimony to impeach a jury verdict." *Tanner v. United States*, 483 U.S. 107, 107 S. Ct. 2739, 2745, 97 L.Ed.2d 90 (1987).

There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper jury behavior. *It is not at all clear, however, that the jury system could survive such efforts to perfect it.* Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, juror's willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post verdict scrutiny of juror conduct.

Id., 107 S.Ct. at 2748 (emphasis added) (citations omitted). The Supreme Court has supported this principle by

repeatedly emphasizing "the necessity of shielding jury deliberations from public scrutiny." *Id.* at 2747.

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberations the constant subject of public investigation — to the destruction of an frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68, 35 S.Ct. 783, 784-85, 59 L.Ed.2d 1300 (1915) *quoted in Tanner*, 107 S.Ct. at 2747. The First Circuit shares this concern, observing that "the unbridled interviewing of jurors could easily lead to the their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as unbalanced trial results depending unduly on the relative resources of the parties." *United States v. Kepreos*, 759 F. 2d 961, 967 (1st Cir.), *cert. denied*, 474 U.S. 901, 106 S. Ct.

227, 88 L.Ed.2d 227 (1985). Numerous other federal courts express similar fears.⁶

Alongside the policy of protecting jury deliberations from intrusive post-verdict inquiries, however, lies the

⁶ Speaking for the Second Circuit, Judge Friendly stated that an "[i]nquiry of jurors after a verdict seeks to impugn the validity of judicial action on the ground of misconduct of a member of the tribunal. The court has a vital interest in seeing that jurors are not harassed or placed in doubt about what their duty is and that false issues are not created." *Miller v. United States*, 403 F. 2d 77, 82 (2d Cir. 1968). The Third Circuit writes that the rule prohibiting juror testimony to impeach a jury verdict was formulated to "discourag[e] harassment of jurors by losing parties eager to have the verdict set aside . . . [to] encourag[e] free and open discussion among jurors . . . [to] reduc[e] incentives for jury tampering . . . [to] promot[e] verdict finality . . . [and to] maintain[] the viability of the jury as a judicial decision making body." *Government of the Virgin Islands v. Gereau*, 523 F. 2d 140, 148 (3d Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S. Ct. 1119, 47 L.Ed.2d 323 (1976). The Fourth Circuit has held that "[i]f jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance." *Rakes v. United States*, 169 F. 2d 739, 745 (4th Cir.), *cert. denied*, 335 U.S. 826, 69 S. Ct. 51, 93 L.Ed. 380 (1948). The Seventh Circuit recently stated that "[a] fruitful exchange of ideas and impressions among jurors is though to hinge heavily on some assurance that what is said in the jury room will not reach a larger audience. This exchange, however crude or learned, is important enough to preserve." *Shillcutt v. Gagnon*, 827 F. 2d 1155, 1159 (7th Cir. 1987). The Eighth Circuit stresses that "[a] central purpose of the rule of juror incompetency is the prevention of fraud by individual jurors who could remain silent during deliberations and later assert that they were influenced by improper considerations." *United States v. Eagle*, 539 F. 2d 1166, 1171 (8th Cir. 1976), *cert. denied*, 429 U.S. 1110, 97 S. Ct. 1146, 51 L.Ed.2d 563 (1977). The Eleventh Circuit noted that the rule "strikes a balance between protecting the defendant's right to a fair trial free from substantial juror misconduct, while protecting the legitimate interests of preventing the harassment of jurors, supporting the finality of verdicts, and preserving the community's trust in a system that relies on the decisions of laypeople." *United States v. Sjeklocha*, 843 F. 2d 484, 488 (11th Cir. 1988).

defendants' constitutional right to a fair trial. The Sixth Amendment "guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him.'" *Parker v. Gladden*, 385 U.S. 363, 364, 87 S. Ct. 468, 470, 17 L.Ed.2d 420 (1966) (per curiam). Because "the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors . . . [t]he failure to accord an accused a fair hearing [also] violates . . . the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). Due process requires only that a juror exposed to publicity be able to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723, 81 S. Ct. at 1642. Both of these specific guarantees—the rights of an impartial jury and of confronting witnesses, as well as the more general assurance of due process—contribute fundamentally to our system of justice. The underlying theory of this system, according to Justice Holmes, is that "conclusions to be reached in a case will be induced only by evidence and argument in open court and not by any outside influence, whether of private talks or public print." *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L.Ed. 879 (1907).

To reconcile these conflicting policies, and to ameliorate the hardships inevitably created by rigidly enforcing the common law rule, the Supreme Court long ago recognized a limited exception to the rule barring inquiries into the validity of a jury verdict.⁷

⁷ Judge Friendly thought that this exception represented "a pragmatic judgment how best to attempt reconciliation of the irreconcilable." *Miller v. United States*, 403 F. 2d 77, 83 n. 11 (2d Cir. 1968). *But cf. Tanner*, 107 S. Ct. at 2747 (noting that judicial investigations conducted because extrinsic influences allegedly taint jury deliberations "do not detract from, but rather harmonize with, the weighty government interest in insulating the jury's deliberative process").

Such an inquiry is permitted only in situations in which an "extraneous influence" is alleged to have prejudiced the jury. *Mattox v. United States*, 146 U.S. 140, 14849, 13 S. Ct. 50, 5253, 36 L.Ed. 917 (1892). Rule 606(b) of the Federal Rules of Evidence codified both the rule and the exception, providing that:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether *extraneous prejudicial information* was improperly brought to the jury's attention or whether any *outside influence* was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. (Emphasis added).

Despite wide acceptance of this approach in federal courts, attempting to set forth with precision and in advance that which constitutes an extraneous influence upon a jury is an elusive and perhaps even futile task. See e.g. *United States ex re. Owen v. McCann*, 435 F. 2d 813, 818 (2d Cir. 1970), cert. denied, 402 U.S. 906, 91 S. Ct. 1373, 28 L.Ed.2d 646 (1971) ("there is no 'litmus paper test' for making such a determination"). The difficulty is rooted in the jury system itself:

All must recognize, of course, that a complete sanitizing of the jury room is impossible. We cannot

expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations. Nevertheless, while the jury may leaven its deliberations with wisdom and experience in doing so it must not bring extra *facts* into the jury room. In every criminal case we must endeavor to see that jurors do not [consider] in the confines of the jury room . . . specific facts about the specific defendant then on trial.

United States v. McKinney, 429 F. 2d 1019, 1022-23 (5th Cir.), *modified on rehearing*, 434 F. 2d 831 (5th Cir. 1970), *cert. denied*, 401 U.S. 922, 91 S. Ct. 910, 97 L.Ed.2d 825 (1971). Not only is it unreasonable to expect "that each juror's mind be a *tabula rasa*," *United States v. Kelly*, 722 F. 2d 873, 880 (1st Cir. 1983), *cert. denied*, 465 U.S. 1070, 104 S. Ct. 1425, 79 L.Ed.2d 749 (1984), it may even be undesirable. The Supreme Court, for example, has never required that jurors be totally ignorant of the facts and issues involved at the outset of a trial. Instead, the Court has consistently recognized that because of

swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impressions or opinions as to the merits of the case. This is particularly true in criminal cases.

Irvin, 366 U.S. at 722-23, 81 S. Ct. at 1642-43. Although trial courts must attempt to ensure that the integrity of a jury proceeding, once begun, is not jeopardized by unauthorized invasions, *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954), few trials would pass constitutional muster if a new trial was required each time a

juror was discovered in a potentially compromising situation. *Smith*, 455 U.S. at 217, 102 S. Ct. at 946. According to the First Circuit, “[a] court’s best defensive weapon, if the jury is not to be sequestered, is a strong anticipatory warning prior to trial.” *United States v. Concepcion Cueto*, 515 F. 2d 160, 164 (1st Cir. 1975). Nevertheless, because “[t]he safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge are not infallible . . . it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.” *Smith*, 455 U.S. at 217, 102 S. Ct. at 946. Thus, the touchstone of the decision in this case is not “the mere fact of infiltration of some molecules of extra-record matter” but rather “the nature of what has been infiltrated and the probability of prejudice.” *McCann*, 435 F. 2d at 818.

A.

[1] Before proceeding to evaluate the defendants’ specific arguments in this case, the proper role for this Court in investigation post-verdict allegations of juror misconduct must be examined. The defendants believe that this Court’s inquiry — which consisted of on-the-record interviews of all twelve jurors and four alternates over a two day period,⁸ in the presence of but without the direct participation of counsel⁹ reveal egregious evidence of misconduct justifying a new trial or, alternatively, a formal evidentiary hearing. They

⁸ The jury foreperson was not available during this two day period, and thus was not interviewed until September 26, 1988.

⁹ After bringing the juror’s allegations of prejudicial misconduct to the Court’s attention, the defendants moved for permission to interview the jurors *ex parte*, without the presence of the Court. Based on the First Circuit’s prophylactic rule barring “the post-verdict interview of jurors by counsel . . . except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate,” *United States v. Kepreos*, 759 F. 2d 961, 967 (1st Cir.), *cert. denied*, 474 U.S. 901, 106 S. Ct. 277, 88 L.Ed.2d 227 (1985), the Court denied the motion.

argue that this Court should employ a rebuttable presumption test to determine whether the misconduct was prejudicial. Under their formulation of this test, any extraneous information which reached the jury is presumptively prejudicial unless the government demonstrates beyond a reasonable doubt that the information was harmless. *See United States v. Perkins*, 748 F. 2d 1519, 1533 (11th Cir. 1984), *United States v. Howard*, 506 F. 2d 865, 869 (5th Cir. 1975). The defendants, however, cite no cases that apply this test to circumstances similar to the facts presented here. *Perkins*, while representative of a line of cases that apply the rebuttable presumption test, is easily distinguished. Cases like *Perkins* involve juries that actively considered, during deliberations, extra-record facts about the case before them. This unauthorized consideration of facts not in evidence has taken many forms. Jurors have consulted reference books, such as dictionaries, for help in understanding technical terms or concepts. They have taken unauthorized views of the scene that is the subject of the case. They have conducted independent experiments and investigations of claims they heard discussed in court. They have even removed tape from exhibits admitted in evidence to learn of the matters not in evidence that lay underneath. *Lacy v. Gabriel*, 732 F. 2d 7 (1st Cir.), *cert. denied*, 469 U.S. 861, 105 S. Ct. 195, 83 L.Ed.2d 128 (1984) (unmasking not so unfair as to deny due process); *Lacy*

(footnote continued)

The defendants also sought permission to participate in the questioning of each juror. On the basis of its broad discretion to determine the extent and type of investigation warranted by the allegations, *United States v. Kelly*, 722 F. 2d at 881, the Court denied the motion. *See also Neron v. Clemons*, 662 F. Supp. 854, 862 (D.Me. 1987), *rev'd on other grounds*, sub. nom. *Neron v. Tierney*, 841 F. 2d 1197 (1st Cir. 1988) (when investigating post-verdict allegations of juror misconduct, "[d]ue process does not require the court to permit counsel to examine or cross-examine the juror"). Nevertheless, after concluding its interview of each juror, defense counsel frequently suggested to the Court, in the juror's presence, additional follow up questions. The Court generally acceded to these requests and asked the suggested questions.

v. *Gardino*, 791 F. 2d 980 (1st Cir.), *cert. denied*, 479 U.S. 888, 107 S. Ct. 284, 93 L.Ed.2d 259 (1986) (unmasking was harmless error and did not violate defendant's confrontation and cross-examination rights).

Perkins involved still another method of considering extra-record facts. During voir dire, a juror withheld from the court and counsel his personal knowledge of the defendant and then used that knowledge to argue for conviction during the jury's deliberations. 748 F. 2d at 1534. The trial court concluded that the misrepresentation was neither intentional nor prejudicial. The Eleventh Circuit determined that this was clearly erroneous and reversed, holding that the juror interjected into deliberations extrinsic information about the defendant that was not in evidence. *Id.* at 1533. Noting that "[t]hese comments were made before a jury which for many hours had remained hopelessly deadlocked, and were made by a juror who was outspoken in his belief that [the defendant] should be convicted," *Id.* at 1534, the court found the likelihood of prejudice to be overwhelming. *Accord United States v. Howard*, 506 F. 2d 865, 866 (5th Cir. 1975) (prejudice found where juror's statement that "defendant had been in trouble two or three [other] times" was used to pressure two jurors during deliberations); *United States ex rel. Owen v. McMann*, 435 F. 2d 813, 815 (2d Cir. 1970), *cert. denied*, 402 U.S. 906, 91 S. Ct. 1373, 28 L.Ed.2d 646 (1971) (in a *habeas corpus* proceeding, prejudice found where three jurors told others during deliberations that the defendant had been suspended from the police force; that he had bad character; and that his father always got him out of trouble); *cf. United States v. Williams*, 809 F. 2d 75, 8081 & n. 2 (1st Cir. 1986), *cert. denied*, U.S. , 107 S. Ct. 1959, 95 L.Ed.2d 531 (1987) (in analyzing whether actual prejudice results from the introduction of extrinsic evidence to the jury, the government has the burden of demonstrating beyond a reasonable doubt that the information was harmless).

I have found no cases that apply the rebuttable presumption test in situations where juries have been exposed to media reports, but did not use that material in deliberating upon a verdict.¹⁰ Indeed, in *United States v. Porcaro*, the First Circuit explicitly rejected as “without merit” the defendant’s contention that the rebuttable presumption test should automatically apply in cases that attract substantial publicity. 648 F. 2d 753, 757 (1st Cir. 1981). Instead, the court held that “where the publicity appearing during the trial is neither inherently prejudicial nor unusually extensive, the defendant must assume the traditional burden of showing actual jury prejudice.” *Id.* at 758.

The well established rule in the First Circuit is that “[w]hen a non-frivolous suggestion is made that a jury may be biased or tainted, the district court must undertake an adequate inquiry into whether the alleged tainting incident occurred and whether it was prejudicial.” *United States v.*

¹⁰ The circumstances of this case bear no resemblance to those cases in which actual bias is assumed because of the pervasive and sensational publicity attending the trial. These so-called Media circus cases have arisen when “the press saturated the community with sensationalized accounts of the crime and court proceedings, and was permitted to overrun the courtroom.” *United States v. Capo*, 595 F. 2d 1086, 1090 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012, 100 S. Ct. 660, 62 L.Ed.2d 641 (1980). See also *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966).

Corbin, 590 F. 2d 398, 400 (1st Cir. 1979).¹¹ Although an

¹¹ In *United States v. Doe*, the First Circuit formally adopted a rule requiring district courts to investigate alleged misconduct by the jury, basing it on the test set forth by the Fifth Circuit in *United States v. McKinney. Doe*, 513 F. 2d 709, 711-12 (1st Cir. 1975), quoting, *McKinney*, 429 F. 2d 1019, 1026 (5th Cir. 1970). As applied, the rule has some flexibility. *Neron*, 841 F. 2d at 1202 "[w]e have found no case which purports to lay down an iron clad rule necessitating post-trial interrogation upon demand of every juror in every circumstance"). The Eleventh Circuit also embraces a flexible version of the *McKinney* test. See *United States v. Barshov*, 733 F. 2d 842, 851 (11th Cir. 1984), cert. denied, 469 U.S. 1158, 105 S. Ct. 904, 83 L.Ed.2d 919 (1985) (There is no *per se* rule requiring an inquiry in every instance"). The Tenth Circuit recently pointed out, however, that *McKinney* was modified on rehearing. See *United States v. Bradshaw*, 787 F. 2d 1385, 1388-89 & n. 1 (10th Cir. 1986), citing *McKinney*, 434 F. 2d 831 (5th Cir. 1970), cert. denied, 401 U.S. 922, 91 S. Ct. 910, 27 L.Ed.2d 825 (1971). Apparently *McKinney's per se* rule mandating a judicially supervised step by step investigation of alleged juror misconduct has neither been adopted, see *United States v. Martinez*, 604 F. 2d 361, 364 (5th Cir. 1979), cert. denied, 444 U.S. 1034, 100 s. Ct. 708, 62 L.Ed.2d 671 (1980), nor followed, see e.g. *United States v. Herring*, 568 F. 2d 1099, 110-406 (5th Cir. 1978), *United States v. Chiantese*, 582 F. 2d 974, 978 (5th Cir. 1978), cert. denied, 441 U.S. 922, 99 S. Ct. 2030, 60 L.Ed.2d 395 (1979), by the Fifth Circuit. Instead, the Fifth Circuit now emphasizes that "the decision to hold a hearing to determine whether juror misconduct has occurred is within the sound discretion of the trial judge and . . . [its] ruling will not be reversed unless it constitutes an abuse of that discretion." *Chiantese*, 582 F. 2d at 978.

The Ninth and Tenth Circuits both reject the *per se* approach, instead relying on the discretion of the trial judge to determine the proper course in responding to the alleged misconduct. See *United States v. Hendrix*, 549 F. 2d 1225, 1227-28 (9th Cir.), cert. denied, 434 U.S. 818, 98 S. Ct. 58, 54 L.Ed.2d 74 (1977); *Bradshaw*, 787 F. 2d at 1390; *United States v. Jones*, 707 F. 2d 1169, 1173 (10th Cir.), cert. denied, 464 U.S. 859, 104 S. Ct. 184, 78 L.Ed.2d 163 (1983). The Ninth Circuit, in fact, cites the First Circuit decision in *Doe* to support the proposition that "it is within the trial court's discretion to determine whether and when to hold an evidentiary hearing on such allegations. If the judge orders an investigative hearing, it is within [the court's] discretion to determine its extent and nature." *Hendrix*, 549 F. 2d at 1227, citing *Doe*, 513 F. 2d at 712.

adequate inquiry must be made “ ‘adequacy’ itself is a dynamic concept,” and the technique for achieving it need not always be the same. *Neron*, 841 F. 2d at 1201. The trial court therefore “has broad, though not unlimited, discretion to determine the extent and nature of its inquiry.” *Id.* In the context of a juror’s post-verdict allegations of jury misconduct, however, the trial judge’s discretion must necessarily be circumscribed. *See supra* Part II A. Jurors may only be asked whether any “ ‘extraneous prejudicial information was improperly brought to [their] attention or . . . any outside influence was brought to bear upon any juror.’ ” *United States v. Gerardi*, 586 F. 2d 896, 898 (1st Cir. 1978), *quoting* Fed.R.Evid. 606(b). Any “further inquiry into the deliberations of the jury [is] not only not required, but . . . improper.” *Id.*

On this record, I believe the obligation to investigate and evaluate the alleged juror misconduct at issue here has been satisfied. In the presence of all counsel, I questioned the sixteen jurors to learn whether they were predisposed or influenced by extraneous information to find the defendants guilty. While I understand the concerns and anxiety of the juror who contacted defense counsel, I questioned him and all his fellow jurors carefully and thoroughly. Having done so, and having received their responses, I cannot understand the defendants’ claim, put forward in one of their motions, that this procedure was “prejudicial to the defendants because it may hamper or impair the juror’s state of mind if he is forced to communicate with the Court in the presence of Government counsel.”

B.

[2] In *Marshall v. United States*, the Supreme Court observed that “[t]he trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Generalizations beyond that statement are not profitable, because each case must turn

on its special facts." 360 U.S. 310, 312, 79 S. Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959) (citation omitted). With this instruction in mind, I turn to the questions raised by the presence of a magazine clipping and newspapers in the jury room during the course of this trial.

The juror who came forward with the misconduct allegation stated that an article clipping from the August, 1988 issue of *Boston Magazine* was "brought in [to the jury room] early in the trial and passed around." This juror did not know if any jurors discussed the subject matter of the article, and stated that he did not read or discuss the article until after the trial concluded and the jury was dismissed. Eight of fifteen fellow jurors, however, acknowledged reading or seeing the article during the trial. Five jurors stated that they did not read it.

The "article" in question is hardly an article at all. Rather it is a short piece, included in a part of the magazine devoted to such short subjects, purporting to identify the five "best and brightest" Boston lawyers involved in representing "wise guys." It reads as follows:

ALL IN THE FAMILY

It's a dirty job, but somebody has to run the bookies, the prostitutes and the drug traffic in and around the city. Turf gets trampled and bullets fly.

But after the corpses bloom in the spring and the subpoenas are served, who you gonna call? Not some matchbook lawyer. No. way. The best and the brightest. A guy who understands Cosa Nostra words like don, capo, and consigliere.

The Reporter set out to find the guys the wise guys call when it's time to go to the legal mattresses. What follows is the wise guy's guide to legal representation.

Anthony M. Cardinale, 37, Boston: Specializes in defending extortion and racketeering cases. Every troubled

[Cardinale photo omitted]

mobster in town kisses Cardinale's ring sooner or later. "Every made guy we pick up has Cardinale's name in his wallet," a federal law-enforcement source says. When Cardinale wasn't representing Gennaro Angiulo, he was helping "Fat" Tony Salerno fight his 29 count indictment in New York City. Now he's handling Vinnie "The Pinhead" Ferrara's appeal against the U.S. government. [descriptions and photos of four other lawyers omitted]

As is apparent, the article makes no mention, directly or indirectly, of this case. None of the defendants is mentioned by name or even alluded to, including Mr. Cardinale's client, Mr. McCormick. Thus, the article is clearly not prejudicial on its face. Rather, the prejudice, if any, must result from inferences jurors might have drawn after reading it. Although the defendant fail to explain or analyze why this piece is prejudicial, relying instead on bald assertions that it is presumptively prejudicial, their argument would have to take the form of the following syllogism: the article states that Mr. Cardinale represents "wise guys" and "mobsters" who are presumably in criminal activity; Mr. Cardinale represents a defendant in this case; therefore, the defendant must be involved in criminal activity. Of course, even accepting this reasoning would lead to the inference that only Mr. Cardinale's client failed to receive the benefit of an impartial jury. Thus the defendant must rely on still another inference. That is, because McCormick must be involved in criminal activity (because he is represented by a lawyer who represent mobsters), all of McCormick's co-defendants must also be involved in criminal activity.

Such speculative and attenuated reasoning about possible prejudice does not justify additional intrusive inquiries into the jury's work in this case, nor does it provide support for granting a new trial. See *Neron v. Tierney*, 841 F. 2d 1197,

1203 (1st Cir. 1988) (the defendant presented "evidence so sparse, a pyramiding of inferences so fragile, a thesis so speculative, as to envelop the bias/misconduct charge in a miasma of doubt"). I have reviewed those cases addressing the issue of juror prejudice resulting from media reports. As one would expect, given the Supreme Court's instruction in *Marshall*, 360 U.S. at 312, 79 S. Ct. at 1172, no hard and fast rule can be drawn from these cases as to what does or does not constitute prejudice that denies a fair trial. These cases, however, involved media reports that appear to be far more prejudicial than the incident at issue here. Nevertheless, in a substantial number of these cases it was determined that the defendant was not prejudiced by the exposure of some or all jurors to the report.

In *United States v. Solomon*, for example, six jurors admitted reading a Chicago newspaper article which twice referred to the defendants as a "reputed crime syndication loan shark." 422 F. 2d 1110, 1117 (7th Cir.), *cert. denied*, 399 U.S. 911, 90 S. Ct. 2201, 26 L.Ed.2d 565 (1970). The article, which appeared in the middle of the trial, also noted that another person had been named in the indictment along with the defendant, and that this person "was slain in gangland fashion." *Id.* The trial judge, after questioning each juror individually, determined that the defendant was not prejudiced by the article. The Seventh Circuit affirmed, noting that the article did not contain "massively inflammatory revelations of prior felony convictions, past criminal conduct, [or] admitted and alleged improprieties" typical of news accounts deemed to be prejudicial. *Id.* at 1118. The article did not describe "inadmissible evidence which was strongly probative of guilt," such as the televised confession at issue in *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L.Ed.2d 663 (1963). *Id.* Finally, the article was distinguished from the situation in *Janko v. United States*, 366 U.S. 716, 81 S. Ct. 1662, 6 L.Ed.2d 846 (per curiam), where the trial court refused to investigate the jury's awareness of a news report in which "the defendant was not only referred to as a relative

and former employee of a "racket boss," but also was called a "former convict" who had previously been found guilty of the same charges but was being retired." *Id.* at 1118-19 & n. 9.

Numerous First Circuit cases have held that juror exposure to media reports did not violate the defendant's right to trial by an impartial jury. *See e.g. Jackson v. Amaral*, 729 F. 2d 41 (1st Cir. 1984); *United States v. Santiago-Fraticelli*, 730 F. 2d 828 (1st Cir. 1984); *United States v. Porcaro*, 648 F. 2d 753 (1st Cir. 1981); *United States v. DiCarlo*, 439 U.S. 834, 99 S. Ct. 115, 58 L.Ed.2d 129 (1978). *Porcaro* is particularly relevant because it analyzes arguments which are strikingly similar to the claims advanced here.

The defendant in *Porcaro*, convicted of violating federal conspiracy and anti-racketeering laws, argued that frequent and relatively prominent *Boston Globe* articles about his trial "could not have failed to come to the attention of the unsequestered jury" and thus were prejudicial per se. 648 F. 2d at 756. The First Circuit noted, however, that "the various articles contained no prejudicial characterizations of [the defendant], his reputation, prior acts, arrests, or convictions, nor any speculation as to his guilt or innocence The crux of [the defendant's] claim of prejudice appears to be that the articles implicitly linked [the defendant] and his co-defendants as members of the same alleged plot, and thereby impermissibly tainted [the defendant] with guilt by association in the mind of any jurors who read the articles." *Id.* The court held that this argument relied "solely on the presumption of prejudice and . . . show[s] no indication whatsoever of actual prejudice, or even the likelihood of prejudice, resulting from the articles. Any claim of prejudice is thus purely speculative, based on the unsubstantiated assumptions that (1) at least one juror read one or more of the articles, (2) the juror was so influenced by the article as to lost partiality, and (3) the juror's bias was not dispelled by the court's repeated instructions to disregard such outside influences." *Id.* at 758.

Porcaro disposes of both of the defendants' arguments concerning potentially prejudicial publicity. The notion of guilt by association, which is the only possible theory, supporting the defendants' argument about the *Boston Magazine* article, was categorically rejected by the First Circuit as "purely speculative." *Id.* Although nine jurors acknowledge reading or seeing the article, there is no evidence suggesting that any of them was so influenced by it as to lose impartiality, nor is there evidence suggesting that any resulting bias was not dispelled by this Court's repeated admonitions to decide this case solely on the basis of the evidence admitted at trial. The defendant's second argument, which concerns the presence of newspapers in the jury room, is even weaker. Not only is there no evidence suggesting that any (or all) of the newspaper coverage of the trial prejudiced the jury, the defendant's failure to raise this issue as the publicity arose forecloses them from raising it now. *Id.* 757. I asked the jury about their exposure to newspaper articles whenever counsel suggested that I do. See *United States v. Perrotta*, 553 F. 2d 247, 251 (1st Cir. 1977). In addition, at various times throughout the trial I admonished the jury not to read, watch, or listen to media reports related to the case. With one exception, the defendant's never objected to my instructions now suggested a different course.¹²

¹² The exception concerns the newspaper article about the speech made by the chief of the Organized Crime Strike Force, discussed *supra*. Like the *Boston Magazine* piece, this article neither directly nor indirectly referred to the defendants or to this case. In the presence of counsel, I questioned the one juror who stated that he had read the article and concluded that he was not prejudiced. For that same reason, I denied the defendant's motion for a mistrial. I also denied the defendants' motion to sequester the jury. I chose not to order sequestration in part because this article appeared while the jury was in the midst of deliberations. Such a measure would have been likely to arouse extreme speculation and curiosity amongst the jury, thereby causing more problems than it possibly could solve. See generally *Mastrian v. McManus*, 554 F. 2d 813, 819 (8th Cir.), *cert. denied*, 433 U.S. 913, 97 S. Ct. 2985, 53 L.Ed.2d 1099 (1977) (sequestration is "one of the most burdensome tools of the many available to assure a fair trial").

C.

[3,4] The impartiality requirement of the 6th Amendment requires a jury each of whose members is willing and able to decide a case solely on the evidence introduced at trial and the instructions of the court. *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961); *United States v. Medina*, 761 F. 2d 12 (1st Cir. 1985). Any preconceived notion about the guilt or innocence of a party does not rebut the presume impartiality of a juror as long as he or she can set aside that opinion and render a verdict based on the evidence. See also *Patton v. Yount*, 467 U.S. 1025, 1037 n. 12, 104 S. Ct. 2885, 2892 n. 12, 81 L.Ed.2d 847 (1984); *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L.Ed.2d 344 (1977); *Murphy v. Florida*, 421 U.S. 794, 800, 95 S. Ct. 2031, 2036, 44 L.Ed.2d 589 (1975); *United States v. Moreno Morales*, 815 F. 2d 725 (1st Cir.), cert. denied, _____ U.S. _____, 108 S. Ct. 458, 98 L.Ed.2d 397 (1987). The question in this case is whether any juror during the course of trial formed such a strong opinion of guilt or was affected by other jurors' opinions as to the guilt or character of the defendant that they failed to keep an open mind and render a verdict based on all the evidence. This finding is one for the trial judge based on his appraisal of jurors' continued impartiality. *United States v. Mirkin*, 649 F. 2d 78, 82 (1st Cir. 1981). See, e.g. *United States v. Anello*, 765 F. 2d 253, 258 (1st Cir.), cert. denied, 474 U.S. 996, 106 S. Ct. 411, 88 L.Ed.2d 361 (1985); *United States v. Kelly*, 722 F. 2d 873 (1st Cir. 1983), cert. denied, 465 U.S. 1070, 104 S. Ct. 1425, 79 L.Ed.2d 749 (1984).

Jurors may make statements about the case yet keep their minds open to the remaining evidence and give the defendant a fair trial. See e.g. *Grooms v. Wainwright*, 610 F. 2d 344 (5th Cir.), cert. denied, 445 U.S. 953, 100 S.Ct. 1605, 63 L.Ed.2d 789 (1980) (Trial judge did not err in refusing to interrogate jurors about one juror's statement "from what I heard he's already guilty" made after close of the prosecutions case because statement did not reflect serious prejudice

but only objective evaluation of evidence to date); *United States v. Chiantese*, 582 F. 2d 974 (5th Cir. 1978), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979) (court did not err in refusing to hold a hearing when after a particular cross-examination a juror remarked to other jurors about the attorney "Stupid. Stupid. Stupid. He's a pain in the _____" because the remark did not indicate partiality); *United States v. Klee*, 494 F. 2d 394 (9th Cir.), *cert. denied*, 419 U.S. 835, 95 S. Ct. 62, 42 L.Ed.2d 61 (1974) (no mistrial warranted when one juror states by affidavit that nine of the jurors expressed opinions as to guilt before the close of the case, given jury's impartiality evidenced by their request for re-reading of court's instructions on sole issue in the case). The important thing is not that jurors keep silent about the case but that each juror keeps an open mind until the case has been submitted to the jury. *Klee*, 494 F. 2d at 396.

Although there may be some question of whether under Fed.R.Evid. 606(b) a judge may even inquire as to the affect

of these statements on the minds of fellow jurors,¹³ it is also entirely possible that those jurors who hear these statements may not be influenced in a way that prejudices the defendant. See e.g. *Anello*, 765 F. 2d 253 (there was no prejudice to defendant warranting a mistrial when one juror remarked after prosecutor's closing argument that "they're all guilty anyway" when that juror and those in near vicinity were

¹³ *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 53, 36 L.Ed. 917 (1892) ("a juryman may testify to any facts bearing upon the existence of any extraneous influence, although not as to how far that influence operated upon his mind. Nor is evidence competent which relates to the thought processes and undisclosed subjective prejudices of individual jurors" quoting *Woodward v. Leavitt*, 107 Mass. 453 (1871); *Government of Virgin Islands v. Gereau*, 523 F. 2d 140, 149, 150 (3d Cir. 1975); cert. denied, 424 U.S. 917, 96 S. Ct. 1119, 47 L.Ed.2d 323 (1976) ("evidence of discussion among jurors, intimidation or harassment of one juror by another, and other intrajury influences on the verdict is within the rule, rather than the exception, and is not competent to impeach a verdict"); *Smith v. Brewer*, 444 F. Supp. 482 (S.D. Iowa), aff'd 577 F. 2d 466 (8th Cir.), cert. denied, 439 U.S. 967, 99 S. Ct. 457, 58 L.Ed.2d 426 (1978) (quotes with approval above language from Gereau); *U.S. v. Kimberlin*, 527 F. Supp. 1010 (S.D. Ind. 1981), aff'd, 805 F. 2d 210 (7th Cir. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 3270, 97 L.Ed.2d 768 (1987) (effect on jury panel of juror statement "They ought to hang him now so we can all go home" may not be the basis of a motion for a new trial because you may not inquire into thoughts and reactions of jurors). I read these cases and the rule to apply to the subjective mental processes of the jurors as regards the ultimate verdict and not how they continued to view the evidence. Still, I recognize that this distinction is subtle. If the rule is read to forbid the inquiry I made then it certainly supports my ruling not to inquire any further into these matters.

removed from the case and despite the fact that other remaining jurors may have heard the statement or resulting discussion); *Kelly*, 722 F. 2d 873 (no error in trial judge's assessment of jury impartiality through questioning conducted after it was reported that one juror had expressed opinions of guilt to others and that juror was removed); *United States v. Doe*, 513 F. 2d 709 (1st Cir. 1975) (no deprivation of a fair trial when, among other events, a juror displayed disgust with the court's ruling by turning his back to the court because that juror was replaced and other jurors were polled as to effect and deemed to be impartial); *Milam v. United States*, 322 F. 2d 104 (5th Cir. 1963), *cert. denied*, 377 U.S. 911, 84 S. Ct. 1174, 12 L.Ed.2d 181 (1964) (no mistrial warranted by a statement made by one juror to two other jurors during a recess, that if he were a witness he would sue that defense lawyer for the way he was harassing witnesses, when that juror was discharged and two listening jurors made no reply); *United States v. Homer*, 411 F. Supp. 972; (W.D. Pa.), *aff'd* 545 F. 2d 864 (3d Cir. 1976), *cert. denied*, 431 U.S. 954, 97 S. Ct. 2673, 53 L.Ed.2d 270 (1977) (no improper influence was shown when a prospective juror remarked that he had heard that the defendants were "just a lot of racketeers" because matter was dropped after original occurrence, there was no evidence that the prospective juror harbored this view himself or that any impaneled jury member held these thoughts or replied untruthfully when questioned about impartiality).

[5] Defendants' allegations of bias based on the mere fact that jurors made remarks do not overcome the strong presumption that the jurors followed my instructions and kept an open mind. As the Supreme Court said almost 100 years ago:

It must be made clearly to appear that upon the evidence the court ought to have found the juror had favored such an opinion that he could not in law be deemed impartial. The case must be one in which it

is manifest the law left nothing to the conscience or discretion' of the trial judge.

Reynolds v. United States, 98 U.S. 145, 156, 25 L.Ed. 244 (1878).

After consideration of the entire record, I believe this jury was and remained impartial throughout the trial. The jurors I interviewed had not closed their minds to the evidence. I do not base this decision only on their own denials of bias, although I did observe their demeanor during voir dire and these interviews. There are still other factors that lead me to this conclusion. First, only seven out of sixteen jurors recalled even hearing any remarks made about the case and only two said there had been "discussion." No juror corroborated the original juror's account that some had said "they're guilty" on the second day of trial. There was simply no remark recounted which reflected a fixed opinion or which would have influenced any other juror to close their mind to the remaining evidence. Second, the jurors were attentive and most appeared to take notes throughout the trial. As stated earlier, the jury was alerted to the conflicting theories by opening statements of some counsel, namely whether the payments were extortion or gifts, and the evidence that followed was consistent with those theories. Third, they deliberated for thirtyfive hours over five and onehalf days. They reviewed a great deal of evidence, including audiotapes and videotapes of some of the meetings with some of the defendants. They asked questions which indicated their attention to the details and evidence in the case. *See supra*, p. 379. In my judgment, the jury performed its difficult and arduous duty in the faithful and conscientious and courageous manner demanded by our jury system.

Justice Woodbrough, dissenting in *Winebrenner v. United States*, 147 F. 2d 322 (8th Cir.), *cert. denied*, 325 U.S. 863, 65 S. Ct. 1197, 89 L.Ed. 1983 (1945), said "[n]o normal honest Americans ever worked together in a common inquiry

for any length of time with their mouths sealed up like automats or oysters.” *Id.* at 330. The question is not silence but is always whether the jury continued to view the evidence with an open mind. Nothing in their interviews or in their behavior during the trial leads me to the conclusion that this jury based their verdict on anything but the evidence. As Judge Kass so aptly put it: “[A]lthough the mouths of some of the jurors may have been too open their minds were not shut.” *Commonwealth v. Scanlan*, 9 Mass. App. 173, 184, 400 N.Ed.2d 1265 (1980).

III.

A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for a day and does justice according to its lights. The group of twelve, who are drawn to hear a case, make the decision and melts away. It is not present the next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off a law and uses consciences to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do. Justice William O. Douglas, *Almanac of Liberty* 112 (1954).

In accordance with the foregoing, I conclude that the evidence in this case was fairly and impartially considered by a fair and impartial jury. The defendants’ motion for a new trial, with its incorporated request for an evidentiary hearing, is denied.

SO ORDERED

APPENDIX D
CONSTITUTIONAL PROVISIONS, STATUTES
AND RULES

Constitutional Provisions

1. Amendment V, Due Process Clause:

“No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ”

2. Amendment VI, Fair Trial Right:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ”

Statutes, United States Code Provisions

1. 18 U.S.C. Sec. 2, (Principals):

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. 18 U.S.C. Sec. 371 (Conspiracy To Commit Offense Or To Defraud United States):

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

3. 18 U.S.C. Sec. 1341 (Frauds And Swindles):

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

4. 18 U.S.C. Sec. 1951(b)(2) (Interference With Commerce By Threats Or Violence):

(a) Whoever in any way, or degree obstructs, delays, or affects commerce of the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongfully use of actual or threatened force, violence, or fear, or under color of official right.

* * *

5. 18 U.S.C. Secs. 1961(1), (4) & (5) (Definitions):

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), . . . section 1951 (relating to interference with commerce, robbery, or extortion),

* * *

(4) "enterprise" included any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

6. 18 U.S.C. Secs. 1962 (c) & (d) (Prohibited Activities):

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to

conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

7. Massachusetts General Law Ch. 268A, Sections 2 & 3:

Section 2 Corrupt Gifts, Offers or Promises to Influence Official Acts; Corruption of Witnesses

(a) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any state, county or municipal employee, or to any person who has been selected to be such an employee, or to any member of the judiciary, or who offers or promises any such employee or any member of the judiciary, or any person who has been selected to be such an employee or member of the judiciary, to give anything of value to any other person or entity, with intent

(1) to influence any official act or any act within the official responsibility of such employee or member of the judiciary or person who has been selected to be such employee or member of the judiciary, or

(2) to influence such an employee or member of the judiciary or person who has been selected to be such an employee or member of the judiciary, to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the commonwealth or a state, county of municipal agency, or

(3) to induce such an employee or member of the judiciary or person who has been selected to be such an employee or member of the judiciary to do or omit to do any act in violation of his lawful duty; or

(b) Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility, or

(2) being influenced to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the commonwealth or on a state, county or municipal agency, or

(3) being induced to do or omit to do any acts in violation of his official duty; or

(c) Whoever, directly or indirectly, corruptly gives, offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such firstmentioned person or any other person as a witness upon a trial, or other proceeding, before any court, any committee of either house of both houses of the general court, or any agency, commission or officer authorized by the laws of the commonwealth to hear evidence or take testimony, or with intent to influence such witness to absent himself therefrom; or

(d) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receivers or agrees to received anything of value for himself or for any other person or entity in return for influence upon the testimony under oath or affirmation of himself or any other person as a witness upon any such trial, hearing or other proceeding or in return for the absence of himself or any other person therefrom; shall be punished by a fine

of not more than five thousand dollars or by imprisonment in the state prison for not more than three years or in a jail or house of correction for not more than two and one half years, or by both such fine and imprisonment in a jail or house of correction; and in the event of final conviction shall be incapable of holding any office or honor, trust or profit under the commonwealth or under any stated, county or municipal agency.

Clauses (c) and (d) shall not be construed to prohibit the payment or receipt of witness fees provided by law or the payment by the party upon whose behalf a witness is called and receipt by a witness of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, in appearing or testifying.

Added by St. 1962, c. 779, Section 1. Amended by St. 1964, c. 287.

Section 3. Gifts, Offers or Promise for Acts Performed or to be Performed; Corruption of Witnesses; Solicitation of Gifts

(a) Whoever otherwise than as provided by law for the proper discharge or official duty, directly or indirectly, gives, offers or promises anything of substantial value to any present or former state, county or municipal employee or to any member of the judiciary, or to any person selected to be such an employee or member of the judiciary, for or because of any official act performed or to be performed by such an employee or member of the judiciary or person selected to be such an employee or member of the judiciary; or

(b) Whoever, being a present or former state, county or municipal employee or member of the judiciary, or person selected to be such an employee or member of the judiciary, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him; or

(c) Whoever, directly or indirectly, gives, offers or promises anything of substantial value to any person, for or because of testimony under oath or affirmation given of to be given by such person or any other person as a witness upon a trial, hearing or other proceeding, before any court, any committee of either house or both houses of the general court, or any agency, commission or officer authorized by the laws of the commonwealth to hear evidence or take testimony or for or because of his absence therefrom; or

(d) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of the testimony under oath or affirmation given or to be given by him or any other person as a witness upon any such trial, hearing or other proceeding, or for or because of his absence therefrom: — shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

Clauses (c) and (d) shall not be construed to prohibit the payment or receipt of witness fees provided by law or the payment by the party upon whose behalf a witness is called and receipt by a witness of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for

time spent in the preparation of such opinion, in appearing or testifying.

Added by St. 1962, c. 779, Section 1.

Federal Rules Of Criminal Procedure

1. Fed.R.Cr.P. 8 (Joinder Of Offenses And Of Defendants):

(a) Joinder of Offenses.

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants.

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

2. Fed.R.Cr.P. 14 (Relief From Prejudicial Joinder):

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

3. Fed.R.Cr.P. 30 (Instructions):

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds for the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

4. Fed.R.Cr.P. 52 (Harmless Error and Plain Error):**(a) Harmless Error.**

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

5. Federal Rules of Evidence, Rule 105. Limited Admissibility

When evidence which is inadmissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

6. Federal Rules of Evidence, Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions, Other Crimes

(a) Character evidence generally.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion; except:

* * *

(b) Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

